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Supreme Court, U.S.
FILED

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No. _____ OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

October Term, 1996

WES OUTDOOR ADVERTISING CO.,
Petitioner,

vs.

NEW JERSEY DEPARTMENT OF TRANSPORTATION,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY.

PETITION FOR WRIT OF CERTIORARI

WESLEY K. BELL, *Pro se*
Counsel of Record
188 Rt. 72
P.O. Box 538
Manahawkin, New Jersey 08050
Telephone: (609) 597-3222
Facsimile: (609) 597-2195

TIMES APPELLATE PRINTING, INC.—Telephone (716) 344-2000

188 pp

QUESTIONS PRESENTED

1. May the State of New Jersey consistently with the First and Fourteenth Amendments to the United States Constitution do the following:

A. Impose a $200.00 per day daily penalty amounting to $219,900.00 during a period that the Defendant had a valid State and Municipal Approval for the erection of a billboard without a trial by jury (when demanded) that right to a Jury Trial has already been decided by this court in *Tull v. U.S.*, 107 S.C. 1831 (1987)?

B. Deny a remand on changed circumstances when the two controlling reasons (other existing permits within 300 feet) no longer existed?

C. Interject a new reason for refusing reconsideration at oral argument before the State Appeal Court (Conservation Zoning) when that Conservation Zoning existed before the original approvals and were a part thereof clearly mentioned in the Zoning Variance and that issue was *never* raised below?

D. Use the Police Power to enter onto Defendant's private property in violation of an existing STAY ORDER by the Appellate Courts and destroy his billboard which had been used as an on-premise political billboard?

E. Allow a Commissioner of Transportation to enter an order in this matter at a time that he was misusing his office for personal gain and had to resign?

F. Permit the Chief Justice of the Supreme Court of New Jersey to set in on this appeal in violation of Rule 1:12-1(c) and CANNON 3, C.(1)(a)(b), (d)-(i), which prohibits her participation since she was Attorney General for New Jersey and had first-hand involvement in this case?

G. Ignore other State and Federal Holdings of controlling effect because New Jersey refuses to implement U.S. Constitutional Holdings for its citizens?

H. Refuse to accept Defendant's offer in writing to the court, (in his brief) to submit to a lie detector test to prove that Defendant never misrepresented to the State or anyone else *that he had purchased adjacent lands from the Firm of FIFTY ACRES,* which was the Administrative Law Judge's findings and basis for her excessive penalties?

I. Revoke a State Billboard Permit without first holding hearings as required by *N.J.S.A.* 52:14 B-11 and then imposing penalities during the period the Permit was valid under the statue?

LIST OF PARTIES

The names of all parties to the proceedings in the court whose judgment is sought to be reviewed here appear in the caption of the case. There is no parent or subsidiary company of any party to be listed.

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Wesley K. Bell trading as WES OUTDOOR ADVERTISING CO. petitions the Court for a Writ of Certiorari to review the judgement of the Supreme Court of New Jersey.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

INTRODUCTION

The issues raised by this appeal are substantial to resolve disagreements among lower courts for their refusal to adhere to holdings of controlling effect on constitutional issues within the State of New Jersey.

New Jersey Courts have a policy to adhere only on reversal and then ignore that reveral on the next matters.

OPINIONS BELOW

The Supreme Court of New Jersey denied reconsideration in this case on April 24th 1997 and also denied a Motion for Disqualification of Chief Justice Deobrah Portiz, on appeal from the Appellate Division of Superior Court of New Jersey at A91. The opinions of the Appellate Division of Superior Court of New Jersey were issued on December 17th 1996 at A76 and A86.

The opinions of the Administrative Law Judge dated May 13th 1991 is located at A9 and the order upholding that decision by the Commissioner of Transportation dated August 9th 1991 is located at A46.

The record opinion of the Administrative Law Judge dated November 17, 1994 is located at A110, and the order upholding that decision by the Commissioner of Transportation dated January 13, 1995 is located at A61.

JURISDICTION

The subject of this case is the constitutionality of the State's Enforcement of Regulations and Police Powers against a targeted individual, using false representations, withholding agency information and failure to shift the burden of proof in a First Amendment Activity while denying Defendant a trial by jury for excessive penalties and computing those penalties against gross income instead of net profit against a person holding a valid state permit that Plaintiffs refused to renew without prior notice and hearing as required by *N.J.S.A.* 52:14 B-11.

Jurisdiction of this Court to review the final judgement of the Supreme Court of New Jersey is conferred by 28 U.S.C. 1257(2) (1976).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Relevant portions of the First, Fifth, Thirteenth and Fourteenth Amendments of the United States Constitution are set forth in the Appendix at A138.

PROCEDURAL HISTORY

This Petition presents important issues of controlling Constitutional Law already settled by this Court and other High Courts which require the State of New Jersey Department of Transportation to follow those policies and standards, clearly set forth by the United States Constitutional Protections, as well as those holdings in *Bell v. Stafford*, 110 N.J. 384, 395, 541 A2d. 692 (N.J. 1988).

The trial judge (Adm. Law) in this case, failed to *Shift the Burden of Proof* against the State in her original hearing on May 13th, 1991 and took testimony against Defendant, in spite of his absence, in the November 17th, 1994 decision, while Defendant was '*hospitalized*, with a '201 over 130' (life-threatening) blood pressure reading, imposing a $218,900.00 penalty without any consideration of Defendant's ability to pay.

The A.L.J. errored in her decision on the penalty imposition on November 17th, 1994, at page 9, lines 21 to 31, on the subject of 'prior violations and deterence'.

The A.L.J. cited wetlands' matters which are presently before this court, under Docket _____ and the TRP 6226-93 case referred to, is not on remand from the Appellate Division but is a 'spin-off' of the wetlands case before this court under Docket _____.

The TRP 6226-93 matter is actually another penalty action, imposing $400,000.00 in fines, on a limited basis without a right to present defenses that no violations '*existed*'. In that TRP-6226-93 case, the A.L.J. permitted the D.O.T. to revoke '*existing permits*', *without any hearings*, by refusing to transfer the permits to Bell after he took title of them from Lincoln Property Co. When Bell appealed to the office of Administrative Law, he was

not allowed to present evidence to support his appeal, resulting in the A.L.J. imposing *excessive penalties* for licensed billboards.

This matter is presently pending in the Appellate Division, under Docket #A-001887-95T3.

The A.L.J. also denied a 'prior request' to grant Defendant a *'Trial by Jury'* on the penalty issue, as required by the United States Constitution (see) *Tull v. U.S.*, 107 S.Ct. 1831 (1987).

The Commissioner of Transportation upheld that decision, and at that same time, denied a Motion for new hearings on ***'changed circumstances of controlling effect'***. The A.L.J. had, in effect, revoked Bell's (Defendant) Permit, because of the existence of two other Permits, within 300 feet. One of those Permits, for Fifty Acres, was originally revoked by the D.O.T., when they issued Bell his Permit, as a 'replacement' and then reinstated to Fifty-Acres. The other Permit was issued to Resorts.

Since both adjacent Permits within 300 feet are now again terminated or not renewed, there now exists 'no reason to deny' the *reinstatement* of Bell's Showboat Permit.

Other reasons for reinstatement included newly discovered evidence and information *withheld* from Defendant Bell by both the D.O.T. and the Administrative Law Judge involving the ***Northern, Atlantic Outdoor*** and ***Shelburne Permits***.

Defendant's counsel subpoenaed all permit information within 3000 feet, which included the ***Northern*** matter, involving both the D.O.T. and Fifty Acres involved in this action.

STATEMENT OF THE CASE

1. Petitioner Wesley K. Bell trading as Wes Outdoor Advertising Co. has been in the Outdoor Advertising business in New Jersey since April 1957.

2. Petitioner Wesley K. Bell operates a First Amendment Activity and is a party with a standing to raise the constitutional issues in a context warranting such a decision in order to fairly resolve the legal controversy endangered by the application of regulations. *Bell v. Stafford*, 110 N.J. 384, 541 A2d 692 (N.J. 1988).

3. The Burden of Proof in this matter fully and clearly shifts to the State and places the burden of meeting the four part standard, set forth in *Bell v. Stafford (supra)* and *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981) at 507 quoting *Central Hudson Gas & Elect. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 563-66, 100 S.Ct. 2343, 65 L.Ed.2d 341, 349-51 (1980). *Doland v. City of Tigard*, U.S.S.Ct. _____ (June 24th 1994).

4. N.J.D.O.T. and its employees and officials are not immune from damage claims for Civil Rights Damages or Constitutional Regulatory Taking Claims. *General Motors v. City of Linden* decided February 3rd 1995 by the Appellate Division of N.J. Superior Court, also *Menlo v. Hafer*, 112 S.Ct. 358 (1991) in which the court held . . .

> "We hold that state officials, sued in their individual capacities, are 'persons' within the meaning of 1983. The Eleventh Amendment does not bar such suits nor are State Officers absolutely immune from personal liability under 1983 solely by virtue of the 'official nature of their acts.' "

5. Enforcement of the N.J.D.O.T. Regulations against Petitioner is clearly a violation of the First Amendment, Fifth, Thirteenth, Fourteenth and Fifteen Amendments of the United States Constitution and also a violation of the New Jersey Constitution, and Article Three, Section Two of the U.S. Constitution, also Title 142 of the U.S.C. Sections 1983, 1985 (3) and 1986.

MOTION FOR SANCTIONS

The Appellate Division Order on Motion for Sanctions *ignores* Defendant's Constitutional Protections and Property Rights *including* Due Process (Order at A76).

The Appellate Court's Order allows the Plaintiffs to '*walk away ... scott-free*', after entering onto Defendant's property and literally destroying his *billboard structure*, without any advance notice and in complete violation of a **Stay Order**, issued by the Appellate Division to prevent such acts, thereby denying Defendant Bell his Right to Due Process.

Judge Gibson's ***Interlocutory Order***, issued for the Removal (*not destruction*) violates the Defendant's First Amendment Rights to 'use of his property and billboard structure, for Political *Free Speech* activities which are *exempted* under 'On Premise' activities and are not within the jurisdiction of the D.O.T. (Order at A86).

REASONS FOR GRANTING THE WRIT

POINT I

Commissioner's Involvement 'Tainted' The Legal Process.

Commissioner of Transportation, Frank J. Wilson, has 'no legal or judicial expertise' to make a decision in this case and has since *'resigned his office'*, to take another position with a firm whose subsidiary benefitted by the awarding of $45 Million dollars worth of contracts to their firm, Daniel, Mann, Johnson & Mendenhall. It is even likely that Mr. Wilson could be indicted shortly by a Federal Grand Jury and therefore, his participation in this case *'pollutes the entire process'* and is in itself sufficient cause to overturn the penalty, the permit revocation and the implementation of penalties (See Press Report dated 11/26/96 attached at A143).

POINT II

Appellate Court Errored On Constitutional Issues And Case Law Holdings.

The Appellate Division, on December 17th, 1996 errored in their decision, rejecting Points 1 through 20 of this Defendant's Brief, when in fact, each of those positions raised, are correct and mandated by controlling Constitutional Holdings and other case law.

On page 3 of the Appellate Decision, lines 21 and 23, the court held:

> "An investigation ensued during which the D.O.T. discovered that the billboard in fact had been erected at the wrong location and that appellant did not own the land."

The truthful facts are (a) that the billboard *was* erected in the *correct location* and (b) the Appellant *did then* and still does own the land on which the billboard was built, and (c) it is the same land that he purchased from the City of Absecon, and (d) they have been sending him the 'tax bills' for this property since its purchase.

POINT III

Appellate Court Errored In Reliance On Disputed Issues Without A Record Below.

The Appellate Court also erored on page 4, stating at line 25 to page 5, line 1:

> "Bell called back and according to the Attorney General, misrepresented that he had obtained the consent."

The fact is, that Bell *DID* obtain verbal consent from D.A.G. Brooks, who then 'lied to the A.L.J. saying he did not consent to a postponement.

The Appellate Court errored on page 5, lines 13 to 15, stating:

> 'a hospital emergency room worker' called the court to report that Bell was there, but would not divulge any other facts.'

This is a blatant lie. The Judge was given '*exact details*' from the attending physician at Southern Ocean County Hospital and the Doctor also told Defendant Bell, after his discussion with the Judge, that *she was 'a very nasty person'*.

POINT IV

Appellate Court Errored On Issues Of Controlling Effect To The Wrong Litigant.

The Appellate Court errored on page 7, lines 3 and 4:

> "these issues have been fully and fairly resolved and upheld on appeal".

The penalty and other issues have *not been* 'fairly or fully resolved' on appeal and are erroneous and are Manifest Injustice. The penalty issue, while totally unjustified, does not comply with the precedents set on *'ability to pay'* in *Kimmelman v. Henkes & McCoy, Inc.*, 108 N.J. 123 (1987) and *Kingsley v. Wes Outdoor Adv. Co.*, 59 N.J. 182 (1970), which are on point in this case.

The Appellate Division, on page 7, lines 15 to 17, of their decision, cites:

> "a court should exercise its power to reopen issues in contravention of this rule sparingly and only where the first decision was clearly erroneous, or to prevent manifest injustice" (citations omitted).

This holding should and would be correct, in *'support'* of Defendant's appeal *rather than* being used *'against'* Defendant's relief.

The A.L.J.'s original decision has so many erroneous holes in it that it could be mistaken for *'swiss cheese'*.

Defendant's Appellate Brief clearly sets forth numerous points of the A.L.J.'s original decision and any one of them is more than adequate grounds for reversal, *i.e.*, (1) newly discovered evidence, (2) withheld agency records, (3) tainted process, (4) change of circumstances and (5) major errors in her findings *without support* in the record, (6) failure to shift the 'burden of proof', and (7) Defendant's offer to take a polygraph test. All of these clearly support Defendant's appeal.

POINT V

The Appellate Court Did Not Properly Review The Decisions Below Required By Rule 1:6-7.

The Appellate Court **errored** at page 8 of their decision, at lines 11 to 20, as follows:

> "It reasoned that these permits originally prevented its location from conforming with spacing regulations, and their subsequent revocation enabled it to construct a sign on its lot which could conform to all spacing requirements.
>
> The Commissioner did not directly address this point. In any event, the argument is unavailing. The fact that the flanking permits may no longer exist does not alter the underlying facts and violations which caused the Commissioner to order appellant to remove its billboard."

The Appellate Judges *failed to properly review the original decision* as cited and the Commissioner of Transportation's Order. (Required by Rule 1:6-7.)

In the A.L.J. Decision, dated May 20th, 1991 at page 18, lines 27 to 30, the holding was as follows:

> "I conclude that, under the equitable standards of estoppel, Bell had a right to rely upon and did reasonably rely upon Nettleton's express agreement that his sign could exceed 60 feet in length although it was required to conform with the maximum square footings limitation of 1,000 which was approved."

The A.L.J. further found at page 20, lines 27 to 33:

> "Spacing Requirements and Penalty:
> Respondent cannot be granted a permit for a sign 470 feet E. of the Delilah Road overpass because it would be in violation of N.J.A.C. 16:41-8.6(a)5v. His sign is within 300 feet of both the unbuilt Fifty Acres and Resort Permits, which are current. Thus the only appropriate penalty pursuant to N.J.A.C. 16:41-8.15 and 8.16 for the violation is removal and recovery of the cost thereof."

The Commissioner held, on 1/13/95, at page 7 of his decision, lines 6 to 20:

> "His claim in his exceptions that the Initial Decision of the OAL dated Nov. 28th 1994 is mooted by the revocation or lapse of two permits for his billboards that were too close to Bell's unlawful billboard, is also completely without merit."

The Appellate Division apparently did not read thoroughly the Commissioner's decision, as they held, in error, at page 8, line 20 to page 9, line 4, as follows:

> "The Commissioner did not directly address this point. In any event, the argument is unavailing. The fact that the flanking permits may no longer exist does not alter the underlying facts and violations which caused the Commissioner to order Appellant to remove its billboard."

POINT VI

The Appellate Court Errored In Permitting Zoning Issues, Not Raised Below, To Guide Decision.

The Appellate Division errored on page 8, line 28 to page 9, line 4, as follows:

> "Also, as the Commissioner pointed out at oral argument, the sign apparently does not conform with DOT zoning requirements. Billboard signs are only permitted in areas zoned industrial or commercial, N.J.A.C. 16:41C-3.2(a)(17), the subject property is zoned conservation-recreation. Thus, appellant failed to demonstrate a sufficient basis for a remand on the 'changed circumstances' issue."

The Conservation-Recreation *Zoning* has never been raised as an issue, *at any time,* or at any level, *before or after the construction of the billboard* and the #9-88 Zoning Board Resolution clearly states on (Sept. 1988) that the Zoning was Conservation-Recreation on paragraph #2 of Decision (see A5).

For the *first time*, the Attorney General raised this **'new zoning issue'** in his Oral Argument, as a reason why the billboard could not remain or be re-constructed.

The State knows it is 'barred' from now raising such an issue and the Appellate Court is in complete error in allowing, accepting or even considering such a position, without a record below and on an issue of 'controlling effect' for reversal and failure to shift the burden of proof on this issue.

The Zoning Issue *was not used against* **Resorts International** when they received D.O.T. approval for their billboard 900 ft. East of Delilah Road Overpass, which is also in the Conservation District, nor was it used against another set of nearby billboards, owned by the **R.C. Maxwell Co.**, *in the exact same zone.*

POINT VII

Appellate Court Failed To Follow Controlling Case Law.

The Appellate Court's holding at page 9, that Defendant is not entitled to a trial by jury, violates the U.S. Constitution and the State's reliance on N.J.S.A. 52:14B-10C a statute which is unconstitutional on its face. See *Tull v. U.S.*, 107 S.C. 1831 (1987).

In the present case, there are clearly *disputed issues of material facts existing*, which barred the A.L.J. from holding a hearing while the Defendant was *hospitalized* with a 'life-threatening' blood pressure reading of 201 over 130.

Defendant Bell is and has been representing himself as pro se, because his income has been devastated by the State of New Jersey D.O.T. and he no longer can afford to hire employees to assist him, so he can earn enough money to hire effective legal counsel.

POINT VIII

Appellate Court Failed To Follow Constitutional Law.

This court, in *Kingsley v. Wes Outdoor Adv. Co.*, 59 N.J. 182 (1970) reduced an excessive billboard penalty against this litigant, which precedent has not been followed, by the A.L.J. in the present case.

In the present case, Defendant Bell ceased to use the **Showboat** billboard for 'off-premise' advertising at the end of their contract, because of the A.L.J. decision, but continued to maintain its size until after the U.S. Supreme Court denied cert. After that time, Defendant 'cured' the violation of oversize square footage as determined by the A.L.J. (see Cure diagram at A141).

The Appellate Division holding that the billboard remains oversized, is in error as follows (See page 8, lines 20 to 21 at A86):

> "As the Commissioner persuasively argues, the billboard is still oversized."

A determination on the 'Cure' issue has never been held on a remand, therefore leaving no record to appeal from, other than Defendant Bell's documentation in his Brief.

It is totally improper for the State to 'inject such contentions' at Oral Argument, without support of a record and then be used by the court to decide a '*turning point*' issue in their decision.

If Defendant had 'cured' the alleged violations at any time before the completion of the appeal process, then the issue of appeal would have become 'moot' and the Commissioner of Transportation had actually '*stayed*' the removal, pending appeal.

POINT IX

The N.J.D.O.T. Has No Authority To Destroy A Political Speech Billboard.

The remaining issues, that the State has the jurisdiction to regulate "On Premise" or Political advertising, is clearly 'censorship in its truest definition and is an 'unconstitutional and self-serving interpretation of the regulations, by the State. The Appellate Division decision A-3505-94T2 (A86) is in error for upholding the agencies position of removing an "On Premise billboard" converted from Commercial Advertising to Political Speech by the property owner, Defendant Bell (see *11126 Baltimore v. Prince George's County, Md.*, 58 F.2d 988 (4th Cir. 1995)).

The court held, at page 994:

> "It is well settled 'that in the area of free expression, a licensing statute placing unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship.' " *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 757, 108 S.Ct. 2138, 2144, 100 L.Ed.2d 771 (1988).

POINT X

State Violated 'Stay Order' In Violation Of Due Process.

In the present case, the N.J.D.O.T. has removed a Political 'on-premise' billboard which was previously used for the election of former Governor James Florio, in 1990, the Republican Party in 1994 and against the Senate race of Frank Lautenberg, in 1995.

This *'removal'* which actually resulted in a *'total destruction'* of the billboard structure and 'removal' of it to a 'landfill' was done in *violation of a* **'Stay Order'** from

the Appellate Division, without any notice to Defendant and without any 'renewed application for lifting the Stay', resulting in a Due Process Violation.

The State (Plaintiffs) has violated the Federal Billboard Regulations, and the State and Federal Constitutional Protections by the removal of Defendant's billboard and the regulatory taking of his property by the revocation of his permit, and the removal and destruction of his billboard (the only use of this property by its owner—the Defendant).

23 U.S.C.S. 131 Provides at page 86, as follows:

> "Just compensation for taking of private property, Section 491 of Act Oct. 22, 1965, provided: 'Nothing in this Act [23 USCS { { 131 and notes, 135 note, 136, 319] or the amendments made by this Act shall be construed to authorize private property to be taken or the reasonable and existing use restricted by such taking without just compensation as provided in this Act' [23 USCS [[131 and notes, 135 note, 136, 319]."

It is clear, without question, that the N.J.D.O.T. has violated these Constitutional Protections, in this instance, yet the Appellate Courts have turned a deaf ear to it; thereby making a complete mockery of the Constitution, while State officials enjoy undeserved protections from prosecution under the color of these judicial errors, the allowance of censorship and due process abuse.

POINT XI

Defendant Bell Is A Recognized First Amendment Activity By This Court And Has The Standing To Invoke Issue.

On point—In *Bell v. Stafford, Supra,* Supreme Court of New Jersey held:

> "Plaintiff Wesley K. Bell, trading as Wes Outdoor Advertising Co. had a standing to press the Constitutional challenge."

POINT XII

The Burden Of Proof Shifts In This Case For Bell To Maintain His Billboard Here.

The **'Burden of Proof'** clearly shifts in this case, *against the State* and the holding by the A.L.J. that the 'Burden of Proof' is on the applicant is in direct contradiction of controlling case law, holding *Bell v. Stafford, (Supra)* and *Metromedia, Inc. v. San Diego,* 453 U.S. 490, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981); *Central Hudson Gas & Elect. Corp. v. Public Serv. Comm'n,* 447 U.S. 557, 563-66, 100 S.Ct. 2343, 65 L.Ed. 2d 341, 349-51 (1980).

The A.L.J. and the Appellate Division *failed* to 'Shift the Burden of Proofs' in this case.

At oral argument, Defendant Bell, addressing the Court, clearly and emphatically stated:

> "The D.A.G. will come before you, again in this case, claiming that I misrepresented the facts to the D.O.T., stating that I purchased adjacent land *from Fifty-Acres.* (Raising his right hand, he said) 'I swear to you and to GOD, under oath, that I NEVER ever represented that I bought land (or anything) from Fifty-Acres, and I NEVER ever lied or misrepresented anything on *any billboard matter!*"

Bell then said:

> "the state's *entire case* is based on *this issue,* which ***does not exist,*** in the record, except for the Deputy Attorney claiming such a position, in his opening and summation, *without any support on the record, whatsoever.*"

The Attorney General's Office has ***initiated and manufactured*** the 'lie' and the A.L.J. has ***'perpetuated'*** it throughout the 'life of this litigation' and it is totally ***'groundless'***. This 'lie' has severely damaged Bell's reputation for honesty, which he has always taken pride in. His honesty has always been held 'in high regard' amongst all of the judges he ever appeared before and his service as a public official for over 13 years, as Mayor and member of the governing body of Stafford Township, which was built on his complete honesty to the public. Defendant Bell would be *more than willing* to take a **'lie detector test'** if it is deemed acceptable by this court and it is necessary to prove his truthfulness in this case as well as to restore his good name.

After receiving a copy of the Hearing Transcript, Defendant Bell sent a copy, with a letter, to the former Aide to Governor James Florio, requesting an investigation into the 'misconduct' of Deputy Attorney General Jeffrey W. Gerber, for his outrageous misconduct, intentional misrepresentations and conspiratorial acts, during the Administrative Law Hearings, in this case.

The very next day, Gerber was dismissed, or forced to submit his resignation. Certainly, such conduct 'tainted the process' and created an unfair hearing in this case, justifying a 'reversal'.

POINT XIII

The D.O.T. Regulations And The Office Of Administrative Law's Enforcement Of Those Regulations, Violate The First Amendment Of The United States Constitution.

The Office of Administrative Law cannot meet its United States Constitutional Review Standards on Billboard (First Amendment) Applications and therefore it is required by law, that the Commissioner of Transportation or the Legislature must provide another method of the Appeal Process.

In *11126 Baltimore v. Prince George's County, Md.*, 58 F.3d 988 (4th Cir. 1995), the court held:

> "In a controlling First Amendment case the Court applied the **Freedman's** standards that:
> (1) any restraint prior to Judicial review can be imposed only for a specified brief period during which status quo must be maintained and,
> (2) expeditious judicial review of that decision must be available, and
> (3) the censor (State, in this case) must bear the burden of going to court to suppress the speech and must bear the burden of proof once in court."

The court also cited, at page 1001, that in:

> "*Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70, 83 S.Ct. 631, 9 L.Ed.2d 584 (1993) noting that prior restraint on speech 'tolerated . . . only where it . . . assured an almost immediate judicial determination of the validity of the restraint.") *Redner v. Dean* @ (F.3d 1495, 1501-02 11th Cir. 1994) holding that prompt judicial review is never available when judicial review may not be sought until exhaustion of administration remedies under a scheme that fails to provide time restraints for administrative decision) cert. denied, _____ U.S. _____, 115 S.Ct. 1697, 131 L.Ed.2d 560 (1995) c/*East Brooks Books*

> *Inc. v. City of Memphis,* 48 F. 3d 220, 225 (6th Cir. 1995) indicating that potential dely of 5 months is impermissible.

In *Richard J. Elrod v. John Burns,* 96 S.Ct. 2673 (1976) the court held:

> "Loss of First Amendment Freedoms, even for minimal periods of time, unquestionably constitute irreparable injury" (Per Mr. Justice Brennon, with two Justices joining and two Justices concurring in result.)

POINT XIV

Testimony Of Bell's Three (3) Engineers *Unrebutted* Yet Ignored By The A.L.J.

The A.L.J.'s decision is silent on the testimony of Bell's engineers, William Rafferty, who is presently the County Engineer, for the County of Atlantic and the City of Atlantic City.

William Rafferty testified, on July 11th, 1990, at page 156, lines 17 to 20 . . . that Bell's billboard:

> "was erected in precise same location" of the billboard located on the U.S. Agriculture Department Aerial Photographs of 1940 and May 3, 1957 and the **Shilling and Thomas surveys.**

The A.L.J. in this case, intentionally went out of her way to '*create a set of events*' in her decision that is not *supported by the Record* and that decision should be determined in error.

It is clear that the A.L.J. and the Appellate Division wrongly placed the Burden of Proof on the Appellant, in spite of the U. S. and the N. J. Supreme Court Holdings in this Appellant's case. (see *Bell v. Stafford,* 110 N.J. 384 and *Central Hudson Gas & Electric v. Public Ser. Comm'n,* 447 U.S. 557, 563-66, 100 S.Ct. 2343, 65 L.Ed.2d 341, 349-51 (1980)).

Clearly, the State D.O.T. Regulations do not meet the Federal Standards, of the U.S. Constitution which pre-empts the State standards.

Additional recent case law, just decided, that has a direct 'controlling effect' in this case, follows:

"*44 Liquormart Inc. v. Rhode Island*, U.S. Sup. Ct. 116 S.Ct. 1495 (1996), the court held:

> "blanket bans" on commercial speech are reviewed with special care" under Central Hudson Gas & Electric Corp. (citations omitted) and that regulation of truthful, non-misleading commercial speech is subject to the same rigorous scrutiny as restrictions are other speech."
>
> "held that the ban fails the Fourth prong because it is broader than necessary."
>
> "In evaluating the bans effectiveness in advancing the State's interest, we note that a commercial speech regulation 'may not be sustained if it provides only ineffective or remote support for the Gov'ts purpose' " (citing Central Hudson).
>
> "For that reason, the State bears the burden of showing not merely that its regulation will advance its interest, but also that it will do so to a material degree."
>
> "Although we do not dispute the proposition that greater powers include lesser ones, we fail to see how that syllogism requires the conclusion that the State's power to regulate commercial activity is 'greater' than its power to ban Truthful, nonmisleading commercial speech."

This holding by the U. S. Supreme Court clearly mandates that the N.J.D.O.T. must bear the "Burden of Proof" in this case, over Bell's **Showboat billboard.**

N.J.D.O.T. Inspector Lloyd testified on July 11th, 1990, at page 99, lines 19 to 24:

Q. And you also concluded or at least thought that it was the remains of the old sign that was permitted to #47910? (Fifty-Acres Permit)

A. For a sign or remnants of it. This is pole 13369 and several pilings you can see.

THE COURT: Okay. 47910.

The pole #13369 is the 'exact location' where Bell built his sign, on 'existing pilings'.

This testimony from the State's own Inspector, *clearly placed* the **Fifty-Acres Permit** ***on Bell's property,*** and *not at* '300 ft. from the OverPass' as held by the A.L.J.

State Inspector Lloyd also testified that Bell had placed his name plaque on the old pilings, for location identification, which was *next to Pole #13369.* (now determined at 460 feet). State Inspector Lloyd also testified, on July 11th, 1990 at page 131, line 3:

Q. And did you mean to indicate by those numerical notations, that all of these applications were in essentially the same location?

A. I could have.

Inspector Lloyd also testified on July 11th, 1990 at Page 71, L. 23 to P. 72, L. 16:

Q. You wouldn't rely on information on file with respect to the permitted location?

A. I try not to use that.

Q. Why don't you use it? Why don't you use it?

A. In reply to Mr. Bell's comment?

Q. Yes.

A. To help keep more accurate or attempt to correct the locations and identify for future reference.

Q. So there's a possibility that a distance recorded on an application on file may be in error, correct?

A. Very possible.

Q. Does that happen often?
A. I would have no idea. I couldn't account for the other inspectors.
Q. In your experience, does it happen often?
A. In my personal cases?
Q. Yes.
A. I try not to let it happen.

This testimony alone, is sufficient grounds for reversal, since the inspector indicated in his **Location Report**, that the Permit held by Fifty-Acres and Bell's Permit Application, and the Billboard's pilings (where Bell erected his billboard) were in essentially the same location.

The N.J.D.O.T. must go beyond their 'remote support' for the Government's purpose in this case—the slight difference in a Certificate of Permit, with a description of 300 ft. versus the agency's Inspector Lloyd's measurement of 300 ft. (Corrected in Court, to 390 ft. because the Inspector *failed to put a 'slash'* in a zero, making it a Nine) which was *then determined* to be 460 ft., *then* determined in error, to be 470 ft. by the A.L.J.—at best to be a 160 to 170 ft. difference (of the Permit description) which was measured from the center line of the Highway by the D.O.T. Inspector.

This testimony by the D.O.T. Inspector Lloyd does not meet the required standard of proofs for a First Amendment Activity to *terminate Bell's Showboat billboard.*

Inspector Lloyd's testimony actually supports Bell's position with regard to his reliance on the D.O.T.'s Permit Issuance. How can the court expect Bell to even suspect that the measurement was in ERROR, when he clearly testified that he (Bell) never measured it himself.

POINT XV

Damages Should Flow To Appellant For Regulatory Taking Of Appellant's Lands By The N.J.D.O.T.

In this case, the N.J.D.O.T. has taken Plaintiff's billboard structure and lands, through regulation without compensation and this court should remand to Superior Court, Law Division of Atlantic County for a *trial on the merits* for *loss of billboard advertising revenues, legal fees, engineering expenses and other expenses including but not limited to actual damages and punitive damages, against those individuals who have violated Bell's Constitutional Protections.*

Plaintiff Bell is entitled to Civil Rights damages in this case for use in a jury trial against those individuals responsible for the 'wrongful' act *of terminating Bell's billboard approvals,* and for the illegal removal of the billboard itself.

See *Earl v. Winne,* 14 N.J. 119 at page 134. The New Jersey Supreme Court held:

> "If the presumption is overcome by convincing proof that they acted in excess of and distinct from their required official duty for personal reasons of their own, then for such acts they are civilly liable."

POINT XVI

A.L.J. Penalty Hearing Without A Jury Violates Due Process.

The A.L.J., with prior knowledge that Defendant Bell was 'hospitalized' with a 'life-threatening' blood pressure reading of *"201 over 130"*—went ahead with penalty hearings, in violation of the Due Process Clause of the New Jersey and United States Constitutions.

Assumptions of 'irrebutability' by the A.L.J., and to go ahead with hearings where the Defendant has no opportunity to cross-examine witnesses, is a direct violation of the Due Process Clause, U.S.C.A. Const. Amend. 14, (see *Stillwell v. Kansas City*, 872 F. Supp. 682 (W.D.Mo. 1995)).

In *Carter v. Lamb*, 872 F.Supp. 784 (D. Nev. 1995) the court held:

> "[1] The Due Process guarantees of the Fifth and Fourteenth Amendments provide that a person may not be deprived of life, liberty, or property without due process of law. These guarantees, however, 'apply only when a constitutionally protected liberty interest or property interest is at stake.' " *Tellis v. Godinez*, 5 F.3d 1314, 1316 (9th Circ. 1993), cert. denied, _____ U.S. _____, 115 S.Ct. 354, 130 L.Ed.2d 309 (1994), and demonstrating the existence of a constitutionally protected liberty or property interest is a threshold requirement to a substantive or procedural due process claim. *Board of Regents v. Roth*, 408 U.S. 564, 569, 92 S.Ct. 2701, 2705, 33 L.Ed.2d 548 (1972); *Wedges/Ledges of California, Inc. v. City of Phoenix*, 24 F.3d 56, 62, (9th Cir. 1994).

In *Hughes v. Unified Sch. Dist. #330 Wabaunsee Cty.*, 872 F.Supp. 882, (D.Kan. 1994) the court held:

> "Once it is determined that due process clause applies, what process is due is not determined by state law. **U.S.C.A. Const.Amend. 5.14.**"

The court also held:

> "One of the minimum requirements of due process protection is an impartial tribunal. **U.S.C.A. Const.Amend. 5.14**".

It is evident the A.L.J., in the present (Bell) case, is not impartial when she holds hearings without the Defendant, while the Defendant is hospitalized for three (3) days and while the Defendant was representing himself as Pro Se.

Such conduct is inexcusable and violates all doctrines of equal application and fairness. The A.L.J. improperly held, in her decision on November 28th, 1994, at page 7, lines 21 and 22:

> "what was there to cross-examine in this material? Nothing relevant, for Bell could not controvert the facts, although given the opportunity to do so."

The facts are that the A.L.J. knew there were differences between the contract periods represented by Bell and those represented by Showboat employees.

Also, the A.L.J. and the Deputy Attorney General were both aware that Bell had demanded a 'jury trial' on any penalties and during telephone conferences on this matter, the A.L.J. said she would not agree to remanding the penalty portion for a jury trial but that Bell could put his requests on the record, at the beginning of the penalty hearings.

Since the hearings were held, *without Bell, during his hospitalization,* he filed the requests with his November 8th, 1994 written objections and cited the authority in the controlling case law by the U.S. Supreme Court, in *Tull v. U.S.,* 107 S.C.1831 (1987).

POINT XVII

Court Should Reconsider All Issues In This Case.

> "The purpose of a Motion to Reconsider, is to bring to the court's attention, changes in law, *errors in courts' previous application of existing law and newly discovered evidence that was not available at the time of hearing.*"

(see *In Re Ashley F.*, 638 N.E. 2d 368 (Ill. App. 1 Dist. 1994) in which the court relied on controlling case law in *Kaiser v. Mepc American Properties Inc.*, (1986) 164 Ill. App. 3d 978, 987, 115 Ill. Dec. 899, 518 N.E. 2d 424. The court held that:

> "to justify a rehearing on the basis of newly discovered evidence, there must be a showing of due diligence and a demonstration that justice has not been done." *Drehle v. Fleming*, (1970) 129 Ill.App.2d 166, 172, 263 N.E. 2d 348.

In the present case, Bell has presented major changes of controlling effect and has clearly demonstrated by the evidence, transcripts and holdings by the A.L.J., that *justice has not been done.*

Appellant's attorney, Theodore Sager Meth, filed exceptions with the Commissioner of Transportation on December 7th, 1994, setting forth unrefutable evidence of changed circumstances, which require that the Commissioner of Transportation re-issue Bell his billboard permit and vacate the penalties in this case (letters of exceptions A125 and A132).

The Supreme Court of New Jersey, in *Housing Auth. of Town of Morristown v. Little*, 135 N.J. 274 at page 285 to page 286, line 5 held:

> "a motion to vacate or modify a judgment on the ground that it is no longer equitable that the judgment should have prospective application must

> be supported by evidence of changed circumstances." *United States v. Swift & Co.*, 286 U.S. 106, 114-15, 52 S.Ct. 460, 462, 76 L.Ed. 999, 1005-06 (1932); *Mayberry, supra*, 558 F.2d at 1163, *SEC v. Hatch*, 128 F.R.D. 58, 61 (D.N.J. 1989). The party seeking relief bears the burden of proving that events have occurred subsequent to the entry of a judgment that, absent the relief requested, will result in "extreme" and "unexpected" hardship. *Mayberry, supra*, 558 F.2d at 1163 (citing *Swift, supra*, 286 U.S. at 119, 52 S.Ct. at 464, 76 L.Ed. at 1008).

The court also held, at page 286, lines 22 to 24:

> "that a court should have the authority under it to reopen a judgment where such relief is necessary to achieve a fair and just result."

POINT XVIII

Chief Justice Poritz Was Required To Step Down In This Matter As The Former Attorney General Responsible For The Prosecution Of This Case As The Attorney Of Record.

The New Jersey Court Rule 1:12-1(c) and Cannon 3, C.(1), (b), (d)-(i), *requires* that the Chief Justice *must* step down in this case as the former Attorney General in charge of its prosecution.

POINT XIX

Defendant's Offer To Submit To A Polygraph Test Is Sufficient Grounds For Remand To Show That Defendant Did Not Misrepresent Information To Agency In Application.

Defendant's offer in writing to the Court, (in his brief) to submit to a lie detector test to prove that Defendant never misrepresented to the State or anyone else that he had purchased adjacent lands from the Firm Fifty Acres, which was the Administrative Law Judge's findings and basis for her excessive penalties.

This Court has recently Granted Certification to another matter based upon the failure of another Court to accept Polygraph Testing to resolve a matter.

CONCLUSION

It is requested that this court grant Certification on these important matters of constitutionality and other grounds.

Respectfully submitted,

s/ WESLEY K. BELL
WESLEY K. BELL, Pro Se and
t/a Wes Outdoor Advertising Co.
P.O. Box 538
188 Rt. 72
Manahawkin, New Jersey 08050
(609) 597-3222
Fax (609) 597-2195

APPENDIX

Supreme Court of New Jersey,
Denial of Certification, #43,456,
Dated March 12, 1997

SUPREME COURT OF NEW JERSEY
C-771 September Term 1996
43,456

FILED
MAR 12 1997
STEPHEN W. TOWNSEND
CLERK

ON PETITION FOR CERTIFICATION

STATE OF NEW JERSEY,
COMMISSIONER OF TRANSPORTATION,
Plaintiff-Respondent,

v.

WES OUTDOOR ADVERTISING CO.,
Defendant-Petitioner.

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-3505-94 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied, with costs.

WITNESS, the Honorable Deborah T. Poritz, Chief Justice, at Trenton, this 11th day of March, 1997.

s/ STEPHEN W. TOWNSEND
CLERK OF THE SUPREME COURT

I hereby certify that the foregoing is a true copy of the original on file in my office.

s/ STEPHEN W. TOWNSEND
CLERK OF THE SUPREME COURT
OF NEW JERSEY

Supreme Court of New Jersey,
Denial of Certification #43,455
on March 12th 1997

SUPREME COURT OF NEW JERSEY
C-770 September Term 1996
43,455

FILED
MAR 12 1997
STEPHEN W. TOWNSEND
CLERK

ON PETITION FOR CERTIFICATION

NEW JERSEY DEPARTMENT
OF TRANSPORTATION,
Plaintiff-Respondent,

v.

WES OUTDOOR ADVERTISING,
Defendant-Petitioner.

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-3340-94 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied, with costs.

WITNESS, the Honorable Deborah T. Poritz, Chief Justice, at Trenton, this 11th day of March, 1997.

s/ STEPHEN W. TOWNSEND
CLERK OF THE SUPREME COURT

I hereby certify that the foregoing is a true copy of the original on file in my office.

s/ STEPHEN W. TOWNSEND
CLERK OF THE SUPREME COURT
OF NEW JERSEY

A5

Decision and Resolution of Absecon Zoning Board of Adjustment, Dated October 19, 1988

EXHIBIT
R-46 ID
7-11-90
DMR

A. BELL, RES
R. 8/24/88
DISK - AZB

ABSECON ZONING BOARD
OF ADJUSTMENT

DECISION AND RESOLUTION

9-88

PERSKIE NEHMAD & ZELTNER, P.A.
1125 Atlantic Avenue, Suite 518
Atlantic City, NJ 08401
(609) 348-1177
Attorneys for Absecon Zoning
Board of Adjustment

IN THE MATTER OF THE
APPLICATION OF WESLEY K. BELL
FOR A USE VARIANCE CONCERNING
LOT 2 IN BLOCK 226.01 ON THE
ABSECON TAX MAP

The instant application for a use variance having been presented to this Board by Wesley K. Bell, appearing pro se, and the Board having heard the testimony of Mr. Bell and having examined the application and other exhibits submitted in evidence, and good cause appearing, the Board does therefore enter the following findings of fact and conclusions of law:

1. Applicant is the owner of that certain property shown and designated as Lot 2 in Block 226.01 on the Absecon Tax Map. The property is located on U.S. Route 30 (the White Horse Pike) and consists of an approximately 11,906 sq. ft. lot.

2. The property is located in the conservation-recreation zoning district under the Absecon Developmental Ordinance and consists entirely of wetlands upon which there are numerous pilings approximately 4 ft. in height remaining from the construction of a former advertising billboard.

3. The applicant desires to reconstruct an advertising billboard upon the property, but in order to do so requires a use variance as such use is not permitted under the conservation-recreation zoning district regulations under the Absecon Developmental Ordinance.

4. Applicant has published notice of this hearing and served all affected property owners as required by law. A public hearing was held before the Board on June 21, 1988, and again on August 16, 1988. At the June hearing, Mr. Martin John McLaughlin, the Sales Manager for Northern Outdoor Advertising Company, objected to the relief requested. Northern Outdoor maintains an advertising sign in this general area, but it was conceded by Mr. McLaughlin that the development of the sign in question had no adverse impact upon the Northern Outdoor Advertising sign.

5. Applicant purchased the property in question from the City of Absecon after being the successful bidder therefore and acquired title pursuant to a deed dated February 17, 1987. Although the deed clearly recited that applicant was responsible for the attainment

of any and all land use approvals for his proposed use, the Board finds that applicant fully disclosed to the Governing Body the reason he wished to acquire the property in question.

6. The Board finds that the property in question was formerly the site of an advertising billboard in prior years. This was established through a photograph from 1938 wherein the property was utilized for a billboard advertising "James Salt Water Taffy". The billboard in question was apparently damaged or destroyed in the 1962 storm, the debris was removed, and the billboard not reconstructed although the pilings are remaining.

7. The applicant has obtained a sign permit from the New Jersey Department of Transportation for this site, said permit dated March 7, 1988 and authorizing the establishment of a 1,000 sq. ft. advertising sign. Based upon the issuance of this permit, and a letter from the DOT dated July 13, 1988, together with attached enclosures which were submitted as Exhibits A-8, A through C, the Board finds that the DOT and its engineers have no objection to the installation of the advertising sign in question on the basis of traffic safety.

8. The Board finds that the property in question is not suited for any other use as it consists entirely of regulated wetlands upon which any developmental activity is prohibited. For this reason, the Board finds that the property in question is particularly suited for the proposed use and that the reestablishment of a sign not to exceed 1,000 sq. ft. in area will not be inconsistent with the intent and purpose of the zone plan or the master plan for the City of Absecon for this area.

9. The Board finds that the site in question is unique as there are pilings existing in and upon the property which can support the sign (or readily be

replaced if necessary), the site was previously utilized for advertising sign purposes, the property is not readily usable for any other purpose and accordingly the request constitutes an appropriate use of land for these reasons and limited to this site only.

10. The Board further finds that special reasons exist as, for the reasons set forth above, the use proposed constitutes an appropriate use of this land given the unique history of this site.

11. On motion of Mr. Hayden, seconded by Mr. Davis, it was and is hereby unanimously RESOLVED that the applicant shall be and is hereby granted a use variance so as to allow for the construction, establishment and maintenance of an outdoor advertising sign having dimensions of 11 ft. x 80 ft. and in no event to exceed 1,000 sq. ft. and conditioned and contingent upon approval of the New Jersey Department of Transportation, and any and all other regulatory agencies exercising proper and rightful jurisdiction.

s/ DOUGLAS TAYLOR
DOUGLAS TAYLOR,
ACTING CHAIRMAN

I, the undersigned, do hereby certify that the above Decision and Resolution accurately and properly sets forth the action of the Zoning Board conducted at its meeting on the date recited above, and that this Decision and Resolution is otherwise accurate in all respects.

s/ ALICE CAPO 10-19-88
ALICE CAPO, SECRETARY

Initial Decision of Office of Administrative Law, State of New Jersey, Dated May 13, 1991

ORDERS AND STAY

Docket # A-6292-90T3

STATE OF NEW JERSEY

OFFICE OF ADMINISTRATIVE LAW

CN 049

Quakerbridge Plaza, Bldg #9

Trenton, New Jersey 08625

(609) 588-6584

A copy of the administrative law judge's decision is enclosed.

This decision was mailed to the parties on MAY 20, 1991.

STATE OF NEW JERSEY

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. TRP 9566-89

AGENCY DKT. NO. 89-523

NEW JERSEY DEPARTMENT
OF TRANSPORTATION

Petitioner,

v.

WES OUTDOOR ADVERTISING
COMPANY,

Respondent.

Jeffrey W. Gerber, Deputy Attorney General, for petitioner (Robert J. Del Tufo, Attorney General of New Jersey, attorney)

Lewis H. Robertson, Esq., for respondent (Evans, Osbourne & Kreizman, attorneys).

John F. Palladino, Esq., for intervenor, Fifty Acres Parcels 3 and 4 (Hankin, Sandson, Sandman & Cowhey, attorneys)

Record Closed: February 21, 1991

Decided: May 13, 1991

BEFORE **NAOMI DOWER-LABASTILLE, ALJ:**

On May, 9, 1989, the Department of Transportation (DOT) sent Wes Outdoor Advertising Company (respondent) a notice that its sign erected at U.S. Rt. 30, Absecon was in violation of *N.J.A.C.* 16:41-8.6(a)5i (oversize). On August 15, 1989, DOT advised that the sign also had been erected on the wrong location and must be removed. The Department of Environmental Protection, Division of Coastal Resources sent respondent a notice of violation (no. 0101-89-010) on the same date. On December 18,

1989, DOT transmitted the matter to the Office of Administrative Law (OAL) for determination as a contested case pursuant to *N.J.S.A.* 52:14F-1 *et seq.*

A prehearing conference was held on March 28, 1990 and the following issues were stated:

1. Is the sign in violation of *N.J.A.C.* 16:41-8.6(a)5i (size)?

2. Was the sign erected at a location other than that on the permit and too close to another licensed location? (*N.J.A.C.* 16:41-8.6(a)5v)

3. Was the sign constructed in coastal wetlands without a DEP permit and hence contrary to *N.J.A.C.* 16:41-8.4(a)14?

Defenses

4. Is the sign a nonconforming one under *M.J.A.C.* 16:41-8.6(a)9i?

5. Is DOT estopped from claiming wrong location?

6. Are DOT penalty regulations *prima facie* or as applied unconstitutional? (First, Fourth, 14th Amendments) (*N.J.A.C.* 16:41-8.16)

DOT sought penalties and removal. On April 11, 1990, Fifty Acres Parcels 3 and 4 (Fifty Acres) sought intervention on grounds it is the rightful owner of the permit no. 15516 granted for application no. 47910 under which respondent claimed rights. I granted intervention on May 3, 1990. Hearings were scheduled for July 10, 11 and 23, 1990.

On June 18, 1990, respondent filed a motion for dismissal on grounds that numerous departmental regulations were unconstitutional, among which was included the penalty regulation, *N.J.A.C.* 16:41-8.16. Respondent stated that the motion was to preserve its rights to make these arguments since I indicated at the prehearing that an ALJ acting within an agency jurisdiction has no authority to declare agency regulations unconstitutional. On June 20, 1990, I advised respondent that if a violation was found, I would address the application of the penalty regulation, *N.J.A.C.* 16:41-8.16, if necessary, and that the hearings would not be adjourned. Respondent stated that the identical constitutional issues were alleged in concurrently filed Superior Court litigation seeking an injunction and damages pursuant to 42 *U.S.C.* § 1988. I was advised that the court dismissed the civil rights claims and the matter is in the Appellate Division.

Hearings were held on July 10 and 11, 1990, but the parties were unable to conclude the hearings on July 23 and substituted August 15, 1990. Further hearing time was scheduled on October 5, 1990. Respondent's principal (Wesley Bell) attended and stated his counsel could not appear due to an emergent matter in the Superior Court. The hearings were concluded on December 4, 1990. Respondent's counsel requested more than 30 days to brief, due to a holiday vacation and subsequently requested an extension of the January 31, 1991 due date to February 7, so that he could review all transcripts. DOT filed its responsive brief on February 21, 1991, whereupon the record closed. (Due to my absence on vacation during the writing period an extension of time

for decision was granted.) A list of exhibits is appended to this decision. The transcripts are designated as follows:

1T July 10, 1990

2T July 11, 1990

3T August 5, 1990

4T December 4, 1990

The issue of a DEP violation is no longer in the case. The Attorney General represented on the first day of hearing that DEP no longer considered respondent's sign in violation of DEP regulations.

Discussion of Testimony

In the findings proposed by the parties, each points to reasons why particular witnesses should be found incredible or unreliable. I will therefore address the credibility issue here, rather than recounting all the testimony, because depending upon one's view of the case, much of the lengthy and complicated fact testimony of respondent's witnesses may be true, but not material. The testimony may have a bearing on credibility, but only on that issue, and therefore will not appear in the operative findings of fact below.

DOT's principal witness was William A. Norton, project engineer and administrator of the Outdoor Advertising Section. Norton has worked in this field for many years and his intelligence, knowledge of the field, and candid demeanor inspired confidence. Norton's subordinate Richard C. Lloyd, was solidly experienced in his work, and candid, but, as is to be expected, his expertise

was of a different level than that of Norton. Lloyd is a field investigator, not an engineer. To the extent that this made him less credible in areas of expertise, such as measurements, it made his *work* somewhat less credible than that of Norton, but he himself was completely believable. Intervenor Fifty Acres produced its principal, Herbert Lahn, whose testimony buttressed DOT's case. He was fully credible. Lahn testified that on March 29, 1978, Fifty Acres purchased land surrounding Lot 2 Block 226.01 in Absecon from Atlantic Realty Company (Atlantic) but would not buy Lot 2 (currently owned by Wesley Bell) because Chelsea Title Company reported that the seller did not have good title. The purchase included all signs (appurtenances) on the property including a "James' sign" which was adjusted outside settlement. In 1987, shortly after Bell purchased Lot 2, he claimed Lahn's partnership held a permit to a sign on his property and asked Lahn to turn it over so that Bell could maintain a 1125 sq. foot sign, which exceeded current DOT size limits. Lahn refused. In 1978, Fifty Acres had obtained a permit for a sign 300 ft. E. of Delilah Rd. overpass on Rt. U.S. 30 replacing the permit held by Atlantic. (Application 47910 replacing 12194; P-9). Bell claimed he had a right to this permit.

There was no genuine credibility issue concerning the witnesses respondent engaged to perform various tasks in proving his case such as engineer William Rafferty, his employee Mark Conover, surveyor Thomas Wood, photographer John C. Sinclair, surveyor Glen McAllister, attorney Glenn Gronland, and sign company employee Williams Somers. These witnesses told the truth, but faulty recollections can occur when witnesses

address actions which occurred ten to 40 years ago. As for the opinions of experts, they are only as good as the facts or theories which form the basis for opinions. Many of the connections were tenuous and based on documents lacking crucial data such as designation of distance from a fixed monument or other clearly identifiable land marker. Finally, even if believed and given full weight under Bell's theory, the testimony proved that Bell built a sign on the exact spot where another sign had existed for many years and that there were no other signs at the site during that period. Bell believes that these facts prove the case. In my view, they are simply a part of his theory.

William Nettleton worked for DOT for 30 years prior to his retirement in 1989, which was forced by threat of disciplinary action. Nettleton was a supervisor in the outdoor advertising section. Nettleton carried on a more loose practice than Norton. He did not resolve all inconsistencies. He approved a Bell application based on the applicant's representations and contrary to Lloyd's recommendation. Nettleton was fairly credible, however, although not nearly so credible as Norton. On certain significant points, his testimony was not really favorable to Bell. For example, he stated that the location on a sign permit was "a legal description assuming [it came from] an existing permit" [3T117:15], and stated several times that he approved Bell's sign because Bell stated he had purchased the site from Fifty Acres. Bell never testified that he had *not* made this representation to Nettleton.

Wesley Bell is the alter ego of Wes Outdoor Advertising, Inc. He has been in the sign business for decades. He is fully aware of DOT advertising regulations and the way in which DOT interprets them. He espouses his own

interpretations. He feels that DOT, particularly Norton, is harassing him. Bell is not capable of accepting refusals. Setbacks become a spring board for new theories or tactics. Bell is absolutely sure he is right on each occasion and if the facts show otherwise, he ignores the inconsistency. His attitude is that his business interests succeed all other concerns. Billboards in and near Atlantic City are highly lucrative because of the casinos in recent years. Bell's testimony was unreliable. Bell does not intentionally lie: he simply believes fervently that the "facts" and law are as he wishes them to be.

In addition to Bell's demeanor throughout a lengthy hearing, various parts of the testimony support my above observations and conclusions that in several principal respects, Bell was not credible. For example, he initially told DOT that there had been no sign on the site he applied for since 1960. Subsequently he claimed rights to a 1125 sq-ft existing non-conforming sign permit because there were pilings where he wanted to place his sign. (He replaced the pilings). In 1989, he stated that the sign on "his" site had advertised James Saltwater Taffy. At hearing, he tried to prove the sign had advertised the Mount Royal Motel. When Bell made his initial application for a permit, he admitted the owner of the lot was the City of Absecon and he did not claim he was leasing from the City. The application was for a sign 60 feet long. This was inconsistent with his subsequent theory of non-conforming use for an 1,125 square foot sign. Bell knew exactly where he wanted to place a sign, for, as testimony showed, it was the spot with the best visibility. His interest in the site was so strong that he eventually proceeded with only a quit claim deed to the lot.

When Bell's first application was denied because it was too close to the Fifty Acres and Resorts permits, he tried to obtain the Fifty Acres permit for a location 300 ft. from the overpass by claiming the site was on his land. (At hearing, measurements by Norton clearly showed that the 300 feet location was on Fifty Acres land.) When Lahn, of Fifty Acres, refused to give up the permit except for a price, Bell demanded that DOT revoke the Fifty Acres permit. He then represented falsely to DOT's Nettleton that his second application could be granted because he had bought the Fifty Acres site. Based on Bell's representation, Nettleton told Bell to mark his application as a replacement of the former Atlantic and Fifty Acres permits. As a replacement, the permit was required to use the same legal description (300 ft. E. of the Delilah Road overpass). At the time, Bell knew that the place he wanted his sign was *not* 300 ft. E., but significantly further to the east. He kept silent on that point and when he testified, he claimed that he did not know this until after the sign was built. Notwithstanding Nettleton's acceptance of Bell's representations, Nettleton did demand that Bell agree to a more conforming size (1,000 sq. ft.) for his sign to obtain a permit, because no sign had existed on the site, by Bell's admission, since the 1960s. Although Bell agreed "to accept" a permit for 1,000 (100x10) square feet, he built one exceeding that size although he was aware of the current regulations mandating the method of measurement and, if in doubt, could easily have asked DOT. At hearing, Bell's theory was that old Treasury regulations applied to measurements. He admitted that he never measured 300 feet to determine the location on the permit. He claimed that as much as a

hundred feet off the legal description was considered acceptable.

With full knowledge of the facts and regulations, and 40 years experience in the business, Bell then constructed a sign, not on the authorized permit location (300 feet east) but about 170 feet further to the east. (300 feet E. was not as good a location for visibility). Bell's final theory was that, despite his own knowing conduct, DOT is estopped to enforce its regulations by requiring removal, because he *relied* on the permit (for size and *his* location, not the 300 ft. E. location on the permit) and because DOT did not stop him from constructing the billboard. DOT would never have realized that Bell's sign was significantly distant from the 300 ft. location authorized if it had not been for Bell's appeal and filing of litigation concerning billboard size. All of the above history of Bell's conduct amply displays his characteristics and intentions and most of it is revealed in uncontroverted testimony or admissions.

Findings of Fact

1. On July 27, 1959, Atlantic City Realty Co. (Frank Gravatt) deeded a lot (lot 2) on Absecon Boulevard in Absecon to Evelyn Off (R-38).

2. In August 1959 Evelyn Off made an agreement to sell lot 2 and another lot with a Shelburne sign on it to Kend Co., Inc. (Max Malamut) who was also an owner of the Shelburne Hotel. The lot 2 description specifically stated it was subject to an existing lease with James Candy Company for an annual rental of $1,890.

3. In October 1959, Atlantic City Realty Co. leased to James Candy Company a 16 by 96 foot sign, about 3/10 of a mile (1584 feet) east of Jonathan's Thorofare facing traffic coming to Atlantic City for $2,400 per year to commence February 1, 1960, with an option to purchase for a period of two years (R-35).

4. On February 29, 1960, Kend Co., Inc. took title to lot 2, which was described in the deed as beginning 95 feet SW from the center line of Absecon Boulevard (measured radial thereto) and 8,581.79 feet W from the SW corner of the concrete slab of the State Highway bridge over Newfound Thorofare. Title was insured by Chelsea Title and Guaranty Company, with exception for "tenure of present occupants." Kend Co., Inc., became National Inns., Ltd in 1968 (R-36, R-37).

5. Lot 2, Block 226.01, bearing the same deed description as Lot 2 described above, was purchased by Wesley Bell from the City of Absecon in a tax sale and included in that sale by Bell's request. He took title by quit claim deed on February 17, 1987 upon payment of $3,000 (R-40). Bell did not have a survey made until September 1987 (P-48).

6. DOT approved application no. 20481 for a 1,125 sq. ft. sign one tenth mile [528 feet] East of the Delilah Road overpass at *pole 3892* on Route 30 in Absecon in 1959, which permit was replaced by application no. 5542 held by Abel Holding Co. (Steel Pier) in 1960. In 1968, Abel held permit no. 5636. The Abel permit was last renewed in 1970 and lapsed (P-11, P-12). Abel also had a permit for a sign two tenths of a mile E. at pole 3888 (R-1c).

7. In January 1969, DOT approved application no. 12194 of Atlantic Outdoor Sign Company for a 1,125 sq. ft. sign on U.S. Rt. 30 in Absecon which was 300

ft East of the Delilah Road overpass. The application identified the advertiser at the time as the Mount Royal Motel. The sign was oriented toward the east-bound offramp of Delilah Road close to its intersection with Route 30 and the sign about 300 feet further to the East was identified as permit no. 5636, application 5542 (Abel) (P-14). A Mount Royal Motel sign existed as early as July 31, 1960, however (3T9 Sinclair photograph), but it was deliberately removed some years ago (3T101).

8. On May 18, 1979, by application no. 49046, Resorts International obtained a permit for a 920 sq. ft. sign on Rt. 30 600 ft. E. of Delilah Road overpass. Permits for this site are current to date (P-13). The grant of this permit meant that no sign existed within about 300 feet, since one would have been visible on inspection.

9. On *March 30, 1978,* Fifty Acres parcels 3 and 4, a partnership, had purchased for $350,000, several lots in Absecon in block 226.01, including lot numbers 1 through 10, with the exception of lot 2, from Atlantic City Realty Company, including all appurtanences on the lots. On the settlement sheet, a "James sign" was specifically noted (P-17 and 18). Fifty Acres did not buy lot 2, because a Chelsea Title Company search indicated the seller did not have good title to it. The Fifty Acres purchase surrounds lot 2 and includes the land 300 ft. E. of Delilah Road overpass (P-7).

10. In May 1978, Fifty Acres made application (no. 47910) to DOT for a 1,125 sq. ft. billboard on Rt. 30, 300 ft E. of Delilah Road overpass, replacing the prior Atlantic Outdoor Advertising Company permit and application no. 12194 (which originally advertized [sic] the Mt. Royal Motel). The permit was

granted on June 7, 1978 and has been renewed each year to date (P-9, P-10).

11. Wes Outdoor Advertising Company, by its owner, Wesley Bell made application (no. 54171) to DOT on July 3, 1986 for a 60x16 foot sign on "an existing piling" near pole no. 13369 on U.S. Rt. 30 near the Delilah Road overpass on land owned by the City of Absecon (P-1). He did not have written permission from the City (4T114-115).

12. Wesley Bell has had his own outdoor advertising business for 33 years and worked with his father in that business since 1944. He is thoroughly familiar with the South Jersey area, including Absecon, Atlantic City and the Delilah Road overpass (4T4:5 to 9). Bell is also thoroughly familiar with the billboard regulations and the penalties for violation because of his hands on daily experience.

13. DOT inspector, Richard Lloyd was assigned to prepare a location report on Bell's application no. 54171. At the site, there was no stake marking Bell's proposed location and there were pilings both East and West of pole no. 13369, which he found to be about 390 feet from the overpass. Lloyd noted that permit no. 47910 (Fifty Acres) had a permitted site 300 ft. and no. 49056 (Resorts) had a permitted site 600 ft. from the overpass (P-20; 2T39-15 to 23; 2T208-15 to 18; 2T209-13 to 23; 2T214-20 to 25).

14. On his drawing, Lloyd erroneously referenced the Fifty Acres permit site as no. 54171 (Bell's application) and the site by the pole as no. 47910 (Fifty Acres permit), but this was immaterial to his denial recommendation, which was based partly on the fact that Bell's proposal site was less than 300 feet from a licensed location (P-20; 2T200-4 to 14; 2T40-21 to 42). Both Bell's and the Fifty Acres site

on Lloyd's drawing appeared close to the 300 ft. East of Delilah overpass description.

15. Lloyd's supervisor, John Nettleton, reviewed the report. Neither man recalled having any information concerning location from Bell except for the telephone pole number. Nettleton directed denial of his application on July 25, 1986 (4T114 to 115; 2T83-8 to 14; 4T118-13 to 23).

16. On December 23, 1986, Nettleton advised Bell: "If you are proposing to place your sign on existing pilings, they would *most likely be* on the site of [the Fifty Acres] permit. Since Fifty Acres parcels maintains their permits up to date, we see this as a conflict with your proposal. If you bought this parcel from the City of Absecon, they are obligated to advise . . . you, as purchaser, and Fifty Acres Parcels, as leasee under contract. We must therefore deny your application . . . until such time as you can resolve this problem" (emphasis added). Nettleton enclosed a copy of the Fifty Acres application (3T119; P-2).

17. On February 23, 1987, Bell wrote to Lahn Real Estate (Lahn is a partner of Fifty Acres) stating that the Fifty Acres permit was on his property. He asked Lahn to assign the permit to him so that he could claim the benefit of a 1,125 sq. foot size and avoid the current regulatory limit of 1,000 square feet (P-19). Lahn refused. He subsequently offered to sell the permit for $20,000 according to Bell.

18. Since the Fifty Acres permit was for a billboard 300 ft. E. of the overpass, Bell knew he would have to prove that *he* owned (or leased) the land at that location in order to obtain the permit. This was true because no permits were obtainable for any site between 300 and 600 feet from the overpass due to the regulations mandating a 300 ft. distance

between signs and Resorts had a permit for a 600 ft. location (P-9, P-13, *N.J.A.C.* 16:41-8.6(a)5v; 1T20 and 21; and inferences).

19. On or about November 9, 1987, Bell went to see DOT supervisor Nettleton, bringing a letter (P-4A), his new survey (P-4B) and a copy of an old photograph (allegedly from 1938) of the James Saltwater Taffy sign (P-4C). He asked Nettleton to revoke the Fifty Acres permit claiming it was for the location of the James sign pilings shown on his survey and grant him a permit for his pending application on the same site of the existing permit.

20. Nettleton interpreted the letter to mean that Bell had purchased the property and Fifty Acres refused to give him the permit which was for that site shown (the pilings) on Bell's land. Bell subsequently represented to him orally, when they met, that he had purchased the land (3T163, 183, 185, 192).

21. Nettleton therefore directed Bell that to obtain a permit replacing the Fifty Acres permit, he should fill in the description on the application indicating the replaced applications, which he did. The legal description of the location was 300 ft. E. of Delilah Road overpass (3T120; P-3). Although Bell had a survey of his land done to seek the permit, he did not have his surveyor make even a rough estimate of the distance from the overpass (4T119:21).

22. On November 16, 1987, Lloyd made an inspection report on the new application; he revised and filed his sketch on November 19, 1987. No stake identifying the site as Bell's was present either on November 16 or on November 22 when he rechecked the site. There were various old pilings visible including some in the 300 ft. E. area. Lloyd recommended denial for a number of reasons: Bell's site measured

about 460 ft. E. of the overpass and was too close to the Resorts permit; it was oversized (over 60 ft. long and over 1,100 sq. ft.); the land was zoned conservation and recreation; the land was wetland, requiring CAFRA and DEP review; and the sign was close to an intersection, requiring a traffic safety report. On November 19, 1987, Nettleton initialed "Deny" (R-24; 1T42-47; P-21, 1T48).

23. No letter of denial is of record, however. Bell again contacted Nettleton, making the same representations as before as to ownership of the land at the Fifty Acres permit site and submitted new "proofs" (R-42). To vitiate the oversize issue, however, Bell agreed to amend his application to limit sign size to 1,000 sq. ft. (100x10). Nettleton overrode Lloyd's recommendation to deny because, although he knew there was a conflict of distance he rationalized that perhaps the legal description was not accurately recorded or the measurement was wrong and believed Bell had a right to the permit because of his representation that he bought the site of the permit (3T191; 3T185; R-24 Note). Lloyd was never told Bell had allegedly bought the site from Fifty Acres.

24. On March 7, 1988, Nettleton approved Bell's application no. 55363 replacing the Fifty Acres permit for a site 300 ft. E. of Delilah Road overpass. Bell had never submitted a copy of a permit or a release from DEP, which he was required to include with his application, however (P-5; 1T22-23). Instead, Bell asserted that he did not need a DEP permit or release (R-42). He also needed a use variance from Absecon because his lot was zoned conservation (R-46).

25. In April 1988, Lloyd first learned of the permit Nettleton issued and was greatly disturbed because

it bore the 300 ft. location, which was inconsistent with his reports (R-27; 2T51). The Fifty Acres permit had been issued for 1988 and had not been revoked. In April 1988, John Nettleton was removed from his responsibility for implementing DOT outdoor advertising regulations (3T111). Lloyd still reported through him (2T53). William Norton became administrator of the section in May 1988) (1T65:22).

26. In November 1988, Lloyd gave Nettleton a notice for Norton that site work had begun at a location 460 ft. E. of the Delilah Road overpass whereas Nettleton had overruled his initial denial and issued a permit for 300 ft. E. He complained that the site work was within 300 ft. of another licensed location. He advised that two 1988 permits existed for the same location (300 ft. E.) and he wanted another inspector to witness the measurements (P-23). Norton did not receive the report and was never made aware that the site work was not at the authorized location. Bell replaced the pilings at "his site" with new ones.

27. In January 1989 Lloyd reported that the framework of Bell's sign looked "very big" (P-23 attachment marked 1/4/89). Norton told him to keep tabs on it and if it was erected contrary to existing regulations, (60 feet in length limit) he should issue a size violation (1T271).

28. On February 23, 1989, Lloyd measured the sign to be 86 feet by 11 feet high or 946 square feet (2T57-58). (At the time, he was aware a use variance was required, but did not know it was for a sign 11x80 feet, not to exceed 1000 sq. ft (R-46, page)).

29. Lloyd issued a size violation on May 9, 1989 (1T22:17-20). At an informal hearing on June 23,

1989, Bell argued that his sign was a non-conforming sign, and under the permits he took over (Fifty Acres) he had a right to build one with 1125 square feet, even though he admitted no sign existed on the premises since 1962 and although he agreed to a 1000 sq. foot sign in order to get Nettleton to issue the replacement permit (P-5; 1T22-24).

30. Norton advised Bell of the results of the hearing on July 10, 1989, stating his sign was not non-conforming and he was in violation as to both square footage (more than 1,000 sq. ft.) and dimensions (more than 60ft. long) (P-5). Norton also advised that DEP claimed a violation of the 1970 Wetlands Act. DOT gave notice of permit revocation within 30 days and penalty for each day the sign displayed advertising. No penalty is assessed if a sign remains blank (P-5).

31. At the time he wrote to Bell, Norton was unaware that Bell's sign had not been constructed 300 ft. E. of Delilah Road overpass, nor was he aware that Bell had not purchased the rights to the permit from Fifty Acres as he represented to Nettleton, and as he indicated on his application. DOT relies on the permit description and on the permit holder's building on the authorized site (1T26:15-22).

32. In late July or early August 1989, Bell filed suit against DOT in the Superior Court, seeking to void the sign regulations and for other relief. As a result of that action, Norton and his inspectors researched the exact location of Bell's sign and the other permits nearby (2T28). At the time the DOT survey crew visited the site the sign was fully constructed. The sign cost about $40,000 to build. (Bell claimed $63,000 at trial but admitted to citing $20,000 on his Absecon Construction permit and $50,000 for actual

construction (4T56). I do not include the cost of land, surveys or litigation in cost.

33. Norton, a civil engineer, personally "wheeled off" the location, measuring it in accordance with *N.J.A.C.* 16:41-8.6a(6). Bell's sign is located 478 ft. E. of the Delilah Road overpass, which is approximately 170 feet from the Fifty Acres permit (1T32:15 to 34:4).

34. Norton also obtained a tax map before he measured the site to assure himself of the location of Bell's lot (Block 226.01, lot 2) with respect to the land and permit of Fifty Acres and the site Bell's sign occupied. He had DOT's records searched and found no permit application had ever been made for a sign located on Lot 2 Block 226.01 at any time (1T29 to 31).

35. As a result of his research, Norton wrote to Bell on August 15, 1989 and stated that he had located his sign 478 ft. E. of Delilah Road overpass, the location specified on his permit and that the only way to correct his violation was to remove the sign (P-6).

36. At the time Norton researched the site, he also "wheeled off" the 300 ft. location, and with reference to the highway survey and tax map, he determined that Fifty Acres does indeed own the location about 300 ft. E. of Delilah Road and, in fact, there were existing pilings near the 300 ft. mark which were consistent with the Fifty Acres permit location. Norton related the locations of the Bell sign and Fifty Acres permit to a James Saltwater Taffy sign on an old photograph supplied by Bell (P-14; 1T29-35).

37. Although there are numerous pilings in the area (1T56-61; P-16 video) precluding certitude, Bell's sign is placed closest to the location of the old

James sign as shown in exhibit P-14 (date unknown, but 1950s vehicles shown) and R-31F (1957) but no DOT permit ever existed for the location (450 to 500 feet from the overpass) (2T150-178; 3T43; P-56, R-57).

38. Two aerial photographs made almost 20 years apart show five billboard sites. To the east of lot 1 (Fifty Acres), beyond the stream can be seen the largest of all (Steel Pier, per P-14) and a smaller one. To the west of the stream, the 1940 aerial (R-56) shows three sign locations and only the central one of the three remains in the 1957 aerial. The central one is on Bell's site. It can be located by reference to the straight drainage ditches on R-56, R-31F and R-28. On the 1940 photo, the signs are almost parallel to the ditches. On the 1957 photo, the central sign has been reoriented: it is no longer parallel to the ditches. Thus the Schilling 1978 survey showed the sign on Lot 2 in a slightly different location then it is oriented today on Bell's survey.

39. By 1957, a sign behind and to the east of the one on lot 2 was gone. It would have been between the first two drainage ditches off the southeastern corner of Lot 2 in Lot 1, which surrounded Lot 2. It would have been between pole 3892 and 3893 (R-28). The other sign missing on the 1957 aerial, by reference to the drainage ditches, was to the west of Lot 2, a relatively short distance away near where Norton placed in on P-14. It would be on a line with the Absecon Boulevard yield sign (P-28) and thus not more than 200 feet to the west of the sign on Lot 2 by the scale measurement of P-28. (Reference was also made to the configuration of the intersection on the aerials).

40. By 1959-61, there was a James Candy ad on a sign close to the current location of Bell's sign on lot 2

(R-33, 34, 35, aerial photos, P-14, finding above). Due to the angle of the photograph and roads, it is not possible to tell how close the sign was to where Bell's sign is now on P-14.

41. In 1940, the sign just east of the James sign location would have been closest to the permit location of Abel according to the pole identification (*see*, Point 6), between the two drainage ditches to the east of the James sign. The third sign, which disappeared between 1940 and 1957, is close to the 300 foot East location (the Fifty Acres permit) as marked by Norton on P-14).

42. By July 31, 1960, a Mount Royal Motel ad had been placed on a sign between 400 and 500 feet East of the overpass on or close to Bell's current site. It could be clearly seen through the overpass; Bell's sign can be seen through the overpass today.[1]

43. A very serious storm in March 1962 blew down the signs in the area and some were not replaced. Pilings remained. Pilings also remained from a 1944 storm (3T42-45; R-46; P-10). The sign at or near the Bell site was actually taken down by workmen, however, at some time between 1960 and 1979. (When the Resorts permit was granted.)

44. DOT permits were renewed for a site 1/10 mile E. (528 ft.) from 1959 to 1970 (Abel) and for the site

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[1] There is no survey documenting the Mount Royal sign as such or locating it with reference to a pole. Since the sign was put up by Atlantic Realty, which owned Lot 1, it is likely that the owner would have tried to place it on his land, and not the land his related principals sold to another (*i.e.* on Lot 2). Testimony indicated that there was only one sign at or near the site between 1960 and 1979, and that illegal placement of signs was not uncommon (3T108-109).

300 ft. E. of the overpass after 1969 (Atlantic/Fifty Acres). Thus a permit was not legally available to replace the sign or signs formerly located between the authorized permit sites (the area 300 to 600 ft. E. of the overpass). This would include either the James and Mt. Royal sign or signs if they were within the 400 to 500 ft. range E. from the overpass and would be true regardless of whether or not the James and Mt. Royal signs were on the same sign pilings. This fact is probably one reason why a sign was not replaced on the site and one reason why lot 2 was allowed to fall into a tax sale. (Inferences from facts found above).

45. Bell's sign is a rectangle (10.5 by 87 feet) with another, smaller half rectangle protruding from the top right three feet. DOT bases fees on the advertising surface, calculating the square footage of the smallest rectangle which encloses the entire advertising surface. By this method of measurement, Norton's calculation resulted in a measurement of about 1175 square feet (13"5'x87') [sic] (1T36:8 to 37:12; P-8).

46. Bell measured only the square footage of the billboard area upon which advertising was placed, excluding all borders to the advertising display and the base, resulting in a measurement of 85.77 feet in length and an average of 10.85 feet in height. The total square footage is 988 (R-47; 3T69). Bell alleged that old Treasury regulations provided for the method of measurement he used.

47. In August or September, Bell's sign was complete and he placed a political advertisement on his billboard. DOT did not advise Bell of penalties at this time because DOT does not regulate non commercial speech (1T62-63).

48. Bell contracted with Showboat Hotel and Casino to display its advertising from November 15, 1989 for one year at a yearly rental of $72,000 at the rate of $6,000 per month. The contract specifies that the billboard space is 10 1/2 by 85 1/2 ft., with panel extending 4 feet above the main billboard (R-65). Bell placed commercial advertising on the billboard on December 6, 1989.

49. On December 11, 1989, DOT gave written notice to Bell that DOT observed the sign being painted with advertising on December 6, and that effective on that date, penalty would run at $200 per day until the sign was removed or penalty corrected (R-14). Bell had previously received a formal penalty notice specifying penalty would accrue at $50 per day for the first 30 days; $100 for the second 30 days and $200 per day subsequently until removal of the sign or violation. By the July 10, 1990 hearing date, the penalty had reached about $32,000 (1T63). At $200 per day for 365 days the amount of penalty would be almost equal to the revenue from the sign ($73,000).

50. Pilings still exist 300 ft. E. of Delilah Road overpass, where Fifty Acres has a DOT authorized location.

51. Bell's sign and the unbuilt permits are in an area where there are no business buildings or houses less than 200 feet apart for one quarter mile or more (P-16).

Conclusion and Disposition

Equitable Estoppel

Respondent claims that DOT is estopped to enforce violations against him, specifically, to force him to remove his sign because it is at a location other than the

one authorized (300 feet) and too close to other licensed locations. Estoppel occurs if the State's conduct amounted to a misrepresentation or concealment of material facts known to it and unknown to respondent; if the State had the intention or expectation that respondent would act based on the State's conduct, and if respondent did in fact rely on the conduct to such extent that he changed his position for the worse. *Carlson v. Masters, Mates, Pilots Pension Plan Trust*, 80 *N.J.* 334, 339 (1979). Carlson also teaches that estoppel may arise by silence or omission where one is under a duty to speak or act. Id., 341. A seminal question is whether or not DOT acted in such a manner as to make it unjust to allow the State to penalize respondent.

The reliance by the party claiming estoppel must be reasonable and justifiable. *N.J. Bank v. Palladino*, 46 *N.J. Super* 6, 13 (App. Div. 1976). As to governmental entities, equitable estoppel is cautiously and rarely evoked. *O'Malley v. DOE*, 109 *N.J.* 309 (1987). Nevertheless, it is invoked against a governmental entity to prevent manifest injustice. *W.V. Pangborne & Co., Inc. v. NJDOT*, 116 *N.J.* 543 (1989). Respondent cites *Tremarco Corporation v. Garzio*, 32 *N.J.* 448 (1960), precluding revocation of a permit after reliance by a purchase of property and expenditure of monies in preparation for construction and two other cases precluding revocation of permits after reliance.

Before Bell took title to lot 2, DOT denied a sign permit for the site because it was too close to other permitted locations, particularly Fifty Acres 300 feet E. permit. Nettleton told Bell in December 1986 his proposal conflicted with the Fifty Acres permit. Bell knew on

exactly what pilings he wanted to place his sign. DOT did not. Bell took title on February 17, 1987, despite the permit denial. Because of his lengthy experience, Bell was well aware that he could never get a permit legally for a site 470 feet E. of the overpass, because an unbuilt site was authorized at 300 feet East. (Nettleton sent him a copy of the Fifty Acres authorization in December 1986). That did not stop him.

To get the Fifty Acres permit, Bell first claimed it was on Lot 2 (yet he claimed he never measured the 300 foot distance or the distance to his site). When Fifty Acres refused to transfer the permit and offered to let Bell purchase it for $20,000, (according to Bell), Bell refused. Considering the ultimate annual lease income of $72,000, this would have been a fair deal if the permit could authorize Bell to build at *his* site. Bell says he did not know at the time he refused to purchase the permit that it was not for *his* site, which was more than 150 feet further East. Having been unsuccessful with Fifty Acres, Bell actually represented to DOT's Nettleton that he had purchased the land at the Fifty Acres site. He knew he had not. If he had, he would not have needed to ask Fifty Acres to transfer the permit. He could have gone to the Superior Court to oust Fifty Acres from use of his property or property rights. Fifty Acres at all time after 1978 owned the land at the 300 foot E. site.

Bell's fraudulent representations induced Nettleton to grant a permit for a 100 by 10 ft. sign in an irregular fashion even though there appeared a conflict of distance. With unclean hands, Bell now claims he relied on the permit. What did he rely on, however? The face of the permit clearly said he was authorized to build at 300ft. E.

of the overpass and at no other place. If he had any doubts that the permit did not cover a site at 470 feet E., he had but to ask the administrator, who was Norton in May of 1988. Lloyd had tried to tell Norton Bell's site work was at the wrong permit location. Nettleton never forwarded the memo to Norton. It is relatively clear that there was, at best, loose practice on the part of Nettleton, but even he would not issue a permit for 470 feet E. of the overpass, which would be clearly contrary to the regulations and thus unauthorized. Given his experience in the outdoor advertising business, his knowledge of the relevant regulations and his knowledge of the course of doing business of the DOT section, Bell could not have reasonably relied on a permit authorizing construction at 300 feet East of the overpass to place his sign at 478 feet East, nor could he reasonably rely on Nettleton's directive to state on his second application that it replaced the Fifty Acres permit because Bell was aware that Fifty Acres had refused to transfer its permit to him.

Bell claimed that DOT should have notified him when its personnel saw him building at an unapproved location, even though it was his obligation to build at the authorized site (300 ft. E.). Lloyd did try to get authority for a DOT team to survey at the time he noticed site work. Nettleton did not forward the request to Norton. Nettleton, however, continued to rely on Bell's representation that Bell now owned the Fifty Acres site. If that representation had been true, then Nettleton could readily infer that Lloyd's request was based on lack of information and not necessary. In these circumstances, Nettleton's failure to give notice to Bell was not a culpable omission supporting estoppel, but rather, was the

logical result of Bell's misrepresentation as to who owned the Fifty Acres permit site.

If my estoppel denial concerning the location of the sign is adopted, and a violation is found and enforced on the issue of location, the billboard must be removed. If the above is the ultimate result, the issue of size may be moot, but the issue of penalty remains. To allow for more complete adjudication, however, I will address the oversize issue because it includes an estoppel element.

When Lloyd saw the framework of the billboard going up, all he could tell was that it looked "very big." He was entitled to presume Bell innocent of any violation until a violation could be seen. What Lloyd could see was that the length of the billboard probably exceeded 60 feet. What was not apparent until the sign was virtually complete was the height and total square footage. On those points, it was not possible for DOT to give notice of an oversizing violation before the project was completed. Bell himself testified that he had adjusted the protruding "bulletin board" section downward prior to completion to accord with a 1,000 square foot limitation (by his method of measurement). Nettleton, who had authority to do so, had agreed with Bell that the sign could be 100 feet long by 10 feet high, or a total of 1,000 square feet. I CONCLUDE that, under the equitable standards of estoppel, Bell had a right to rely upon and did reasonably rely upon Nettleton's express agreement that his sign could exceed 60 feet in length, although it was required to conform with the maximum square footage limitation of 1,000 which was approved. This conclusion is a close question, however, because the only reason Nettleton approved any element of nonconformity was because he

believed Bell had taken over the Fifty Acres permit, which allowed 1,125 square feet of sign area. Thus, it could be argued rather persuasively that Bell could not reasonably rely on Nettleton's agreement for an overlength sign because he knew it derived from the Fifty Acres permit to which he had no right. From Nettleton's point of view, it was in the public interest to get a permit holder to agree to make a permitted sign more conforming. Had a "replacement" sign been constructed on the authorized site, Nettleton's agreement could be viewed as beneficial and, on the length issue, an estoppel would prevent an unjust result.

The Unauthorized Site and Distance Violation

N.J.A.C. 16:41-8.1 defines "permit" as a certificate issued by the Outdoor Advertising Section granting permission to erect a sign *at the location described thereon.* The permit said 300 feet E. of the overpass. Bell's sign was about 470 feet of the overpass. Depending on the exactitude of measurement (via theodolite, transit, "wheeling off" or odometer), Bell's sign was 460 to 478 feet E. We are not here concerned with a deviation of ten feet (as between ten feet more or less than 470). The argument of respondent that building 100 to 150 feet away from the authorized site is acceptable is absurd when it is known that legally licensed locations must be 300 feet apart. (Bell knew from his first denial and discussions with DOT that there were unbuilt permit locations at about 300 and 600 feet E.). Bell was aware of the 300 foot proximity regulations. Regulation would be chaotic if a licensee could locate within 100 or 150 feet of his permit site.

There is no merit to the argument that the 300 foot authorization was an incorrect location in the first place and that the Mt. Royal Motel sign (formally listed on the Fifty Acres permit by its predecessor licensees) was actually on the land which Bell *subsequently* bought. (After the sign disappeared). The fact is that if a Fifty Acres permit predecessor built the sign at the wrong location not in accordance with its permit (300 feet), that has no bearing on the current issue. If a Fifty Acres predecessor had a pre-regulation sign at 470 feet E. and accepted a permit stating it was 300 feet E., the fault was that of the permit holder, not DOT, which accepted the permit holder's measure. The old signs (James and Mt. Royal) and their owners are long gone and what violations or errors they may have committed are not at issue.

The term "legal description" was used by Nettleton and Bell in the sense of "just a legal description," i.e., not an actual measurement and not what is significant. Both have an erroneous view of the meaning of the term. A permit is a legal document granting a right to do something. A deed and mortgage are also legal documents. Such legal documents often contain controlling descriptions and land measures. Bell's right to build a sign stems from the permit granted. The legal description is an essential element of the grant. DOT granted and Bell accepted a permit conditioned on the legal description of location. DOT did not *erroneously* grant a permit for 300 feet as distinguished from 470 feet. It could not legally grant a permit in derogation of its own rules. A loose analogy to the old principle of estoppel indeed applies: the State could not deny it gave Bell the right to build at the 300 foot location, but Bell cannot claim the State gave

him a right to build at some place other than that legally described. *Suburban Golf Club v. State Highway Comm'r*, 92 *N.J. Super.* 125, 139 (Law Div. 1966).

If Bell had built at the 300 foot E. location, however, Fifty Acres could have gone to court to have the sign removed because Bell had no right to build on the Fifty Acres property. Obviously, the legal description of a site is vital. Policy wise, a conclusion that the legal description of the grant of right of the DOT permit is determinative of whether or not a violation has occurred is the only viable regulatory interpretation which can be placed on *N.J.A.C.* 16:41-8.1 *et seq.* by the plain meaning of the definition of permit and the entire context of the regulatory scheme. *N.J.A.C.* 16:41-8.4(a) provides that any roadside signs shall be by permit . . . and pursuant to the conditions set forth in such permits. One such condition, the most important one, is placement at the specified site. Unless the regulation is thus interpreted, it is impossible to give force to the mandate for 300 foot and 100 foot spacing in *N.J.A.C.* 16:41-8.6(a)5v. I CONCLUDE that respondent has violated his permit by building at an unauthorized site and building less than 300 feet from two authorized permit locations (Fifty Acres and Resorts). The result of any other interpretation is amply illustrated in the record of this case, which involved extensive probing into non-relevant matters which occurred years ago and required the study of old deeds, maps, surveys, correspondence, photographs and the memory of old timers.

Spacing Requirements and Penalty

Respondent cannot be granted a permit for a sign 470 feet E. of the Delilah Road overpass because it would be in violation of *N.J.A.C.* 16:41-8.6(a)5v. His sign is within 300 feet of both the unbuilt Fifty Acres and Resorts permits, which are current. Thus the only appropriate penalty pursuant to *N.J.A.C.* 16:41-8.15 and 8.16 for the violation of unauthorized placement and spacing violations is removal and recovery of the cost thereof.

Size and Non-Conformity

Although these issues may be mooted by removal, several recent cases I am aware of have brought the same issues into prominence. I believe it is in the public interest to decide these issues as well as to afford a complete determination in this case because of the concurrent Superior Court appeal and the need to determine penalty. Respondent argues in this case that his sign is nonconforming and that he thus had the right to a square footage exceeding current limitations of 1,000 square feet and a length of 60 feet.

N.J.A.C. 16:41-8.1 defines nonconforming sign as:

> . . . a sign, display or device which was lawfully erected and maintained prior to the enactment, revision or amendment of N.J.S.A. 27:7A-11 et seq. (Chapter 371, Laws 1971), or of its pursuant regulations, but fails to conform with requirements of said statute by reason of such enactment, revision or amendment, or by reason of any other change in conditions.

Advertising structure is defined as:

> . . . any rigid or semi-rigid material, with or without advertisement displayed thereon, situated upon or attached to real property outdoors, primarily or principally for the purpose of furnishing a background or base or support upon which an advertisement may be posted or displayed.

N.J.A.C. 16:41-8.6(a)9 states that a lawfully categorized nonconforming sign structure may remain if it meets the following criteria:

> (1) It must continue to be lawfully erected and maintained;
>
> (2) It has not been destroyed, abandoned, disused;
>
> (3) Its size is the same as on the effective date of the adoption, revision, or amendment of the law or regulation which rendered the sign nonconforming;
>
> (4) Its illumination is substantially the same as on the effective date of the adoption, revision, or amendment of the law or regulation which rendered the sign nonconforming. Illumination may not be provided for nonconforming signs which had no previous lighting. Revisions in the type of illumination will be permitted with prior approval of the New Jersey Department of Transportation, to allow for use of more energy efficient lighting systems.
>
> (5) Its basic structure remains substantially the same as on the effective date of the adoption, revision, or amendment of the law or regulation which rendered the sign nonconforming. Changes in the basic structural components

will be considered by the New Jersey Department of Transportation, if it can be demonstrated by the permittee that such revisions are necessary to meet local building codes or State or Federal regulations.

Based on the findings, a sign existed at or near Bell's site on Lot 2 as far back as 1940. Its construction may have predated permit requirements. Thus that sign was presumptively lawfully erected prior to L. 1971 C. 371. It did not continue to be lawfully maintained, however, because no permit was ever issued for a sign at or near 470 feet E. of Delilah Road overpass at any time. The closest permit to the site in 1959 was 528 feet E. of Delilah Road overpass, but it had lapsed by 1971 (Finding no. 6). In 1969, the first permit for the 300 ft. E. site was granted (Finding no. 7). Thus an advertising structure (pilings) remained on the Bell site, but no permit was ever applied for or granted for it after regulation began. On the basis of lack of lawful maintenance (*i.e.*, obtaining a permit) after 1971, Bell's sign can not be categorized as a nonconforming sign structure.

Additionally, the sign had been destroyed and the structure (pilings) disused for may years before Bell purchased Lot 2 in 1987. Under *N.J.A.C.* 16:41-8.6a9i(2), such a sign structure cannot remain as a nonconforming sign. The sign structure was abandoned, disused and destroyed as those terms are defined in *N.J.A.C.* 16:41-8.4(a)13. Notice to the permittee was not required because there was no permittee for the Bell site on Lot 2. If a permit had existed for the site and the owner continued to renew it, the *structure* could not be considered

abandoned, and the location would be classified as an unbuilt location.

Because respondent's sign was not a nonconforming sign, respondent was obligated to conform to the 1,000 square foot limitation of *N.J.A.C.* 16:41-8.6(a)4i. Pursuant to *N.J.A.C.* 16:41-8.6(a)4 and 5i, the dimensions *include* "border, trim, cutouts and extensions, but exclude decorative bases and supports." *N.J.A.C.* 16:41-8.1 defines the area of advertising surface as the "area in square feet measured by the smallest square, rectangle, triangle, circle or combination thereof which will encompass the entire sign." The regulations are quite clear and the sign measured by Norton in accordance with them has a square footage of about 1,175. Bell's method of eliminating all border and trim in measuring it patently contrary to the regulations and without any support in law. The argument that proper measurement for a nonconforming sign is in accordance with old Treasury regulations is frivolous because current regulations clearly deal with nonconforming signs. Furthermore, Bell had *agreed* to a sign of 1,000 square feet. I CONCLUDE that Bell intended from the beginning to construct a sign with a square footage of at least 1,125 square feet (P-19, letter to Lahn) and knowingly and deliberately constructed a sign well above the agreed upon 1,000 square foot limitation contrary to law and to his agreement with Nettleton.

Penalty

N.J.A.C. 16:41-8.16 provides that a dollar penalty may be imposed in addition to the penalty of removal, upon any person who erects, uses or maintains any advertising

structure without complying with all of the applicable provisions of *N.J.S.A.* 27:7A-11 *et seq.* Fines or penalties are authorized by *N.J.S.A.* 27:7A-23, but that statute applies to Superior Court proceedings and includes a criminal penalty. Removal as a remedy is authorized (*N.J.S.A.* 27:7A-22). *N.J.S.A.* 27:7A-17 authorizes the Commissioner of Transportation to adopt regulations governing roadside advertising. *N.J.A.C.* 16:41-8.16 has been in effect and has not been amended since April 1973. (5 *N.J.R.* 167(b)). The afore cited regulation establishes a minimum penalty ($50) identical to that in *N.J.S.A.* 27:7A-23, but contains a lower maximum penalty per offense ($200) than the statute ($500). The rule adds a section defining each day of violation as a separate offense. There appears to be no case law on the issue of the validity of *N.J.A.C.* 16:41-8.16 or the penalties therein. I therefore assume the promulgation of the rule as to fines to be within the authority of the Commissioner. It would be legally inappropriate for an ALJ in a forum within the agency's jurisdiction to conclude otherwise. I note, however, that the rule adoption follows the statute slavishly and includes authorization for imprisonment in default of payment. I interpret that section to be applicable only in a collection proceeding in a court of competent jurisdiction.

Assuming the rule on penalties to be valid, I next address the manner of its application. I have found as a fact that DOT does not regulate noncommercial speech. The regulator ignored Bell's use of the billboard for political advertisement, even though both the rule and statute do not *prima facie* exclude noncommercial speech. Thus its application does not appear to be constitutionality offensive to the First Amendment.

Although the penalty sought in this case adds up to many dollars, DOT has proved that its purpose of deterrance is well served by the magnitude of the total dollars in this case. Respondent received $6,000 a month or $72,000 per year for use of the billboard. Blatant violations of the kind found here cannot be deterred if the penalty is less than the reward for continued unlawful conduct. At the rate of $50 per day for the first 30 days, $100 for the second 30 days and $200 per day until removal, on July 10, 1990, $32,000 in penalty accrued. Thus after 60 days, the penalty is $73,000 per year of 365 days (at $200 per day). This sum very closely tracks the gross income received by respondent for use of the billboard. I CONCLUDE the penalty assessed is in no way arbitrary, and is not excessive given the nature of the offenses in this case. There would be no deterrance at all if removal were the only remedy: construction and removal costs would be nothing but a minor cost of doing this kind of lucrative business. I so CONCLUDE.

It is therefore ORDERED that respondent remove the sign within ten days of a final order in this docket, and if respondent does not do so, DOT may assess costs of removal; and

Further ORDERED that respondent shall pay a fine of $50 per day for the first 30 days, $100 for the next 30 days and $200 per day thereafter until removal of the sign, penalty to accrue beginning on December 6, 1989.

I hereby FILE My initial decision with the COMMISSIONER OF THE DEPARTMENT OF TRANSPORTATION for consideration.

This recommended decision may be adopted, modified or rejected by the COMMISSIONER OF THE DEPARTMENT OF TRANSPORTATION, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Transportation does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR, OFFICE OF REGULATORY AFFAIRS, DEPARTMENT OF TRANSPORTATION, 1035 Parkway Avenue, CN 600, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

May 13, 1991
Date

/s/ Naomi Dower-Labastille
NAOMI DOWER-
LABASTILLE, ALJ

Receipt Acknowledged:

May 15, 1991
Date

/s/ Gail Gurba
DEPARTMENT OF
TRANSPORTATION

MAY 20 1991
Date

Mailed to Parties:

/ct

/s/ Jaynee LaVecckia
OFFICE OF
ADMINISTRATIVE LAW

Final Decision of Department of Transportation, State of New Jersey, Dated August 9, 1991

STATE OF NEW JERSEY
DEPARTMENT OF TRANSPORTATION

FINAL DECISION
OAL DOCKET NO. TRP 9566-89

NEW JERSEY DEPARTMENT
OF TRANSPORTATION,

Petitioner,

v.

WES OUTDOOR
ADVERTISING COMPANY,

Respondent.

Jeffrey W. Gerber, Deputy Attorney General for petitioner (Robert J. Del Tufo, Attorney General of New Jersey, attorney)

Lewis H. Robertson, Esquire, for respondent (Evans, Osbourne & Kreizman, attorneys)

John F. Palladino, Esquire, for intervenor, Fifty Acres parcels 3 and 4 (Hankin, Sandson, Sandman & Cowhey, attorneys)

The New Jersey Department of Transportation (DOT) charged respondent Wes Outdoor Advertising Company (Respondent) with violating *N.J.A.C.* 16:41-8.6(a)5i by erecting an oversized sign. The Respondent was also charged with violating *N.J.A.C.* 16:41-8.6(a)5v in that the Respondent erected a sign at a location other than that on the permit and too close to another licensed

location. On December 18, 1989, DOT, pursuant to *N.J.S.A.* 52:14B-1 *et seq.*, transmitted the matter to the Office of Administration Law (OAL) for determination as a contested matter.

A prehearing conference was held on March 18, 1990 and hearings were held on July 10 and 11, August 5 and December 4, 1990. Two parties filed briefs setting forth Proposed Findings of Fact and Conclusions of Law. On February 21, 1991 the record closed. Judge Naomi Dower-LaBastille filed her Initial Decision on May 13, 1991. Subsequently, exceptions were filed by two parties including cross-exceptions by the Attorney General's Office. I have received the Initial Decision in this matter as well as the testimony, exhibits, Proposed Findings of Fact and Conclusions of Law and the exceptions and cross-exceptions filed by the parties. Upon review I have determined that I will adopt the Administrative Law Judge's Findings of Fact, Conclusions of Law and recommended penalty for the reasons set forth in her Initial Decision.

FINDINGS OF FACT

I hereby adopt the fifty one (51) Findings of Fact made by the Administrative Law Judge.

EQUITABLE ESTOPPEL

I hereby adopt the conclusion reached by the Administrative Law Judge denying Respondent's claim that DOT is estopped from forcing him to remove his sign because it is at an unauthorized location. I also adopt the Administrative Law Judge's conclusion recognizing that there was agreement that the sign could exceed 60 feet in length. I emphasize, however, that the Respondent knew that the agreement carried with it the

requirement that the sign conform with the maximum square footage limitation of 1,000. Respondent violated this agreement.

UNAUTHORIZED SITE AND DISTANCE VIOLATION

I hereby adopt the conclusion reached by the Administrative Law Judge that the Respondent violated his permit by building a sign at an unauthorized site which site is less than 300 feet from two authorized permit locations.

SPACING REQUIREMENTS AND PENALTY

I hereby adopt the Administrative Law Judge's conclusion that because of existing permits a permit cannot be issued for a sign 470 feet east of the Dililah Road overpass and that the appropriate penalty is removal of the sign and recovery of the cost.

SIZE AND NON-CONFORMITY

I hereby adopt the conclusion reached by the Administrative Law Judge that the sign constructed by the Respondent does not satisfy the requirements of *N.J.A.C.* 16:41-8.1 *et seq.* and, therefore, is not a non-conforming sign. Further, I adopt the Administrative Law Judge's conclusion that the Respondent intended from the beginning to construct a sign exceeding 1,000 square feet and that he did knowingly and deliberately construct a sign well above the agreed upon 1,000 square foot limitation, contrary to the law and to his agreement.

PENALTY

I hereby adopt the Administrative Law Judge's assumption that the rule on penalties is valid, and its application is not constitutionally offensive. I also adopt the Administrative Law Judge's conclusion that the penalty in neither arbitrary nor excessive.

IT IS ON THIS 9th day of August 1991, ORDERED that Wes Outdoor Advertising Company shall remove or shall cause the removal of the sign within ten days of the Final Decision, and if Wes Outdoor Advertising Company does not do so, DOT may assess costs of removal and further ORDERED that West Outdoor Advertising Company shall pay a fine of $50 per day for the first 30 days, $100 for the next 30 days and $200 per day thereafter until removal of the sign, penalty to accrue beginning on December 6, 1989.

STATE OF NEW JERSEY
DEPARTMENT OF
TRANSPORTATION

s/ TOM DOWNS
THOMAS M. DOWNS
Commissioner of Transportation

Order of Department of Transportation, State of New Jersey, Dated September 10, 1991

STATE OF NEW JERSEY
DEPARTMENT OF TRANSPORTATION

ORDER GRANTING IN PART
AND DENYING IN PART A STAY

OAL DOCKET NO. TRP 9566-89

NEW JERSEY DEPARTMENT
OF TRANSPORTATION,

Petitioner,

v.

WES OUTDOOR
ADVERTISING COMPANY,

Respondent.

Jeffrey W. Gerber, Deputy Attorney General for petitioner (Robert J. Del Tufo, Attorney General of New Jersey, attorney)

Lewis H. Robertson, Esquire, for respondent (Evans, Osbourne & Kreizman, attorneys)

John F. Palladino, Esquire, for intervenor, Fifty Acres parcels 3 and 4 (Hankin, Sandson, Sandman & Cowhey, attorneys)

This matter has come before the Commissioner of Transportation on the application by Respondent for a stay of the August 9, 1991 Final Decision, in which the Respondent has been ordered to (a) remove or cause the removal of the sign within ten days of the Final Decision and (b) pay a fine of $50 per day for the first 30 days,

$100 per day for the next 30 days and $200 per day thereafter until removal of the sign, penalty to accrue beginning on December 6, 1989. Petitioner has filed a response in which Petitioner does not object to a stay of that portion of the Final Decision that orders the removal of the sign within 10 days of the Final Decision. Petitioner does object to a stay of the penalties. I have reviewed the papers filed by both parties and there being good and sufficient reason therefor,

IT IS on this 10th day of September, 1991, ORDERED:

1. A stay of that part of the Final Decision that orders the removal of the sign within 10 days is granted;

2. A stay of the part of the Final Decision that orders payment of a fine of $50 per day for the first 30 days $100 per day for the next 30 days and $200 per day thereafter until removal of the sign, which penalty is to accrue beginning on December 6, 1989 is denied.

STATE OF NEW JERSEY
DEPARTMENT OF
TRANSPORTATION

s/ TOM DOWNS
Thomas M. Downs
Commissioner of Transportation

Appellate Division Opinion,
Docket A-6292-90T3, Dated
March 31, 1993

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF
NEW JERSEY
APPELLATE DIVISION
A-6292-90T3

(Filed Mar. 31, 1993)

NEW JERSEY DEPARTMENT
OF TRANSPORTATION,

Petitioner-Respondent,

v.

WES OUTDOOR ADVERTISING COMPANY,

Respondent-Appellant.

Argued: March 9, 1993 – Decided: MAR 31 1993

Before Judges Pressler, R.S. Cohen and Kestin.

On appeal from the Department of Transportation.

Wesley K. Bell, *pro se*, argued the cause for appellant.*

Leroy Touchton, Deputy Attorney General, argued the cause for respondent (Robert J. Del

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*We assume that Wes Outdoor Advertising Company is an unincorporated, sole proprietorship. *R.* 1:21-1(c).

Tufo, Attorney General; Mary C. Jacobson, Deputy Attorney General, of counsel, Mr. Touchton on the brief).

PER CURIAM

In 1989, the Department of Transportation determined that a sign owned by appellant, Wes Outdoor Advertising Company (the company), on Route 30 in Absecon was oversize and had been erected in a location other than that permitted. The company was ordered to remove the sign. At the company's request a contested case hearing was held before an administrative law judge. The agency's earlier order was sustained by the Commissioner of Transportation in a final decision wholly adopting Judge Dower-LaBastille's findings and conclusions.

After fully considering the briefs and oral arguments advanced, we regard the issues raised to be clearly without merit. *R.* 2:11-3(e)(1)(D) and (E). The agency's findings and conclusions are supported by substantial evidence in the record. *Close v. Kordulak Bros.*, 44 *N.J.* 589, 598-99 (1965).

We remand on the issue of penalty only. Since December 6, 1989, the company has been under order to pay $50 per day for the first 30 days, $100 per day for the next 30 days and $200 per day thereafter until removal of the sign. *See N.J.S.A.* 27:7A-23 (since repealed and superceded by *N.J.S.A.* 27:5-16); and *N.J.A.C.* 16:41A-8.1 (since repealed and superceded by *N.J.A.C.* 16:41C-10.5).

Under some circumstances, a $50-$200 per day penalty might well be seen as excessive. In this instance, however, it was acknowledged at oral argument that the

company's gross income from the billboard at issue was $6,000 per month, about $200 per day. While a violation of law exists, it is not inappropriate for the Department of Transportation to impose a penalty which at least equals or reasonably exceeds the amount of income the violator has received from the unlawful billboard. No person should be permitted to profit from his or her own unlawful activity. *Cf. Carr v. Hoy*, 2 *N.Y. 2d* 185, 158 *N.Y.S. 2d* 572, 139 *N.E. 2d* 531 (1957).

Nevertheless, it was also asserted at oral argument that the contract which generated the $6,000 per month payment terminated in November, 1992. Under these circumstances, it is essential that a determination be made at the administrative level concerning the precise dollar penalty to be imposed after specific facts are established either by way of stipulated or in a hearing limited to that issue alone.

Affirmed in all respects except as to the specific penalty amount to be imposed. The matter is remanded for a determination of that issue. We do not retain jurisdiction.

Appellate Division Denial of Motion for Reconsideration Docket A-6292-90T3 on May 6th 1993

A-6292-90T3

NEW DEPARTMENT OF TRANSPORTATION

VS

WES OUTDOOR ADVERTISING COMPANY

APPELLATE DIVISION DOCKET NO. A-6292-90T3

MOTION NO. M-5221-92

BEFORE PARTY: E

JUDGE(S): PRESSLER
COHEN
KESTIN

MOTION FILED: MAY 6, 1993

ANSWER(S) FILED:

BY:

BY:

BY:

BY:

BY:

SUBMITTED TO COURT: MAY 24, 1993

ORDER

THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT, IT IS ON THIS 24th DAY OF May, 1993, HEREBY ORDERED AS FOLLOWS:

MOTION BY APPELLANT/~~RESPONDENT~~
WES OUTDOOR ADVERTISING CO
FOR RECONSIDERATION

GRANTED	DENIED	OTHER
	X	

SUPPLEMENTAL:

FOR THE COURT:

/s/ Sylvia B. Pressler
SYLVIA B. PRESSLER P.J.A.D.

Supreme Court of New Jersey Denial of Petition for Certification, Docket 37,025, Dated September 23, 1993

SUPREME COURT OF NEW JERSEY
C-99 September Term 1993
37,025

NEW JERSEY DEPARTMENT OF TRANSPORTATION,

Petitioner-Respondent,

v.

WES OUTDOOR ADVERTISING COMPANY,

Respondent-Petitioner.

ON PETITION FOR CERTIFICATION

(Filed Sept. 23, 1993)

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-6292-90 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied, with costs.

WITNESS, the Honorable Robert L. Clifford, Presiding Justice, at Trenton, this 21st day of September, 1993.

/s/ Stephen Townsend
CLERK OF THE
SUPREME COURT

Supreme Court of New Jersey Denial of Reconsideration, Docket 37,025, Dated March 24, 1994

SUPREME COURT OF NEW JERSEY
M-873 September Term 1993
37,025

NEW JERSEY DEPARTMENT OF TRANSPORTATION,

Petitioner-Respondent,

v.

WES OUTDOOR ADVERTISING COMPANY,

Respondent-Movant.

ORDER

(Filed Mar. 24, 1994)

This matter having been duly presented to the Court, it is ORDERED that the motion for reconsideration of the petition for certification is denied.

WITNESS, the Honorable Robert L. Clifford, Presiding Justice, at Trenton, this 22nd day of March, 1994.

/s/ Stephen Townsend
CLERK OF THE SUPREME COURT

Supreme Court of the United States
Denial of Certification, Dated
October 3, 1994

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

October 3, 1994

Mr. Leroy D. Touchton
R.J. Hughes Complex
CN 114
Trenton, NJ 08625

Re: Wes Outdoor Advertising Company
v. New Jersey Department
of Transportation
No. 93-2059

Dear Mr. Touchton:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is denied.

Very truly yours,

William K. Suter, Clerk

Supreme Court of the United States
Application for Extension to File
Petition, Dated November 2, 1994

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

WILLIAM K. SUTER
CLERK OF THE COURT

AREA CODE 202
479-3011

November 2, 1994

Ms. Deborah Poritz
Richard J. Hughes Complex
CN 114
Trenton, NY 08625

Re: Wes Outdoor Advertising Company
v. New Jersey Department of
Transportation
Application No. A-318 (93-2059)

Dear Ms. Poritz:

The application for an extension of time within which to file a petition for rehearing in the above-entitled case has been presented to Justice Souter, who on November 2, 1994, endorsed thereon the following:

"Denied
DH Souter
11/2/94"

Sincerely,

WILLIAM K. SUTER, Clerk
s/ By FRANCIS J. LORSON
Francis J. Lorson
Chief Deputy Clerk

NOTE—FOR YOUR INFORMATION: A copy of this letter has been sent to all interested parties shown on the attached notification list.

Final Decision of Department of Transportation, State of New Jersey, Dated January 13, 1995

STATE OF NEW JERSEY
DEPARTMENT OF TRANSPORTATION

FINAL DECISION
OAL DOCKET NO. TRP 4425-94

NEW JERSEY DEPARTMENT
OF TRANSPORTATION,

Petitioner,

v.

WES OUTDOOR ADVERTISING,

Respondent.

Pia M. Pyles, Deputy Attorney General, for petitioner, (Deborah T. Poritz, Attorney General of New Jersey, attorney)

Wesley K. Bell, respondent, pro se

The New Jersey Department of Transportation (DOT) charged Wes Outdoor Advertising, owned by Wesley K. Bell (Bell), with various billboard violations in 1989. The matter was transmitted to the Office of Administrative Law (OAL) on December 18, 1989, for determination as a contested case pursuant to *N.J.S.A.* 52:14B-1 *et seq.* On May 31, 1991, the Administrative Law Judge (ALJ) Naomi Dower-LaBastille filed an Initial Decision in the matter (TRP 9566-89) and on August 9, 1991, the DOT issued its Final Decision adopting the ALJ's conclusion that Bell had violated

applicable regulations by erecting a billboard at an unauthorized location and by placing it too close to two authorized billboard locations. Additionally, the Final Decision adopted the ALJ's conclusion that Bell had erected a billboard exceeding the allowed size limitations.

Bell appealed to the Appellate Division and on March 31, 1993, the Appellate Division affirmed in all respects the ALJ's Initial Decision regarding Bell's unlawful billboard. However, the Appellate Division remanded on the sole issue of the specific penalty amount to be imposed. Bell filed a motion for reconsideration by the Appellate Division, a Petition for Certification and a motion for reconsideration by the New Jersey Supreme Court. All were denied. Upon application, the U.S. Supreme Court denied Bell a Writ of Certiorari.

On October 19, 1994, following numerous delays by Bell, ALJ Naomi Dower-LaBastille took proofs *ex parte* on the remanded issue of the penalty amount. The record remained open until November 10, 1994. ALJ Dower-LaBastille issued an Initial Decision on the sole remanded issue on November 17, 1994. Exceptions were filed in this matter on December 8, 1994, by Theodore Sager Meth, Esquire, on behalf of Bell. The DOT filed a brief in opposition to Bell's exceptions on December 22, 1994. Mr. Meth filed a reply brief to the DOT's opposition brief, which was received by the DOT on January 5, 1995.

FINDINGS OF FACT

I adopt the Findings of Fact made by the ALJ.

DISCUSSION AND CONCLUSIONS

A. SUMMARY PROCEDURE

I adopt the ALJ's finding that Bell's primary motivation at all times during this lengthy process was to delay the imposition of a penalty. (I.D. p. 7).[1] Bell was successful in delaying the imposition of a penalty and the removal of the unlawful billboard for a period of five years. *Id.* Bell sought numerous adjournments and extensions and simply did not adhere to timetables and requests for information set forth by the ALJ. (I.D. p. 2-5). Given the strategy of delay outlined in ALJ Dower-LaBastille's chronology of events, *id.*, she was entirely correct in her finding that Bell intentionally sought to postpone the imposition of any penalty

The only issue to be decided by the ALJ in this matter was a factual one regarding the specific penalty amount to be imposed upon Bell for his unlawful billboard. The only additional facts needed by the ALJ pertained to the amount of revenue gained by Bell from the unlawful billboard. The Appellate Court, in ordering a remand, stated that the necessary facts could be established by stipulation or by a limited hearing. (A.D. p. 3).[2] The ALJ thus determined that a plenary hearing was not necessary to obtain the limited facts concerning revenue (I.D. p. 6).

I adopt the ALJ's conclusion that very good cause existed to transform the proceedings to a modified summary proceeding. (I.D. p. 7). *N.J.A.C.* 1:1-14.6(d) provides that "in individual cases, the judge at any time

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[1] "I.D." refers to the Initial Decision of the ALJ decided on November 17, 1994 in OAL Docket No. 4425-94.

[2] "A.D." refers to the Appellate Division's decision remanding OAL Docket No. 4425-94.

of the proceeding may convert any form of proceeding into another, whether more or less formal." The ALJ notes in the decision that "there is no due process violation in molding this portion of the administrative proceedings to meet necessity. . . .' for the odd problem, difficult litigants or other unusual circumstances, the judge is sufficiently empowered to adapt the case to the situation'." *Id.* (*Admin. Law and Practice,* Lefelt §121, p. 143 and *N.J.A.C.* 1:1-14.6(d) and (k). Thus, both Mr. Bell's delaying conduct and the limited nature of the information needed to properly assess the penalty in this case justified the ALJ's use of the summary proceeding.

After Bell's failure to appear at two prior scheduled hearings, finally on October 19, 1994, the ALJ took evidence *ex parte* on the sole issue of the revenue generated from the unlawful billboard. The ALJ subsequently directed Bell to file facts controverting the proposed revenue findings and penalty calculations by affidavit. (I.D. 6). However, Bell chose to file an unsworn statement, which could not be relied upon as a basis for findings (I.D. 6). Further, even the unsworn statements did not contradict the proposed revenue findings.

Bell was not deprived of an opportunity for cross examination. There was nothing relevant on which to cross-examine. The Showboat witness merely presented documents proving payment to Bell for the billboard advertisement. William Norton, the Director of DOT's Regulatory Affairs Department testified simply to update the calculation of the penalty given Showboat's documentation showing the exact payments made to Bell. That there was nothing relevant upon which to cross-examine is verified by the fact that Bell did not controvert the testimony presented even though given the opportunity to do so in a sworn statement. I,

therefore, adopt the ALJ's conclusion that there is no constitutional ban or fundamental fairness argument which renders improper her decision to proceed summarily.

B. PENALTY

I adopt the ALJ's conclusion that an appropriate penalty for Bell's billboard violation is $218,900 as calculated under DOT's per diem rules. I adopt the ALJ's finding that Bell received $216,000 in revenue from the unlawful billboard. The period of the billboard advertising contract between Bell and Showboat Hotel and Casino was from December 8, 1989 to January 11, 1993. I.D. 1, pp. 8; 15.[3] Bell's unsworn testimony that the billboard contract ended in November 1992 is noted as untrue by the ALJ. I.D. p. 8.

The ALJ notes that *Kimmelman v. Henkels and McCoy Inc.*, 108 *N.J.* 123 (1987) is instructive in detailing factors to be considered when evaluating per diem penalties. The good or bad faith of the defendant is a factor. In the instant case the ALJ notes that her findings in TRP 9566-89 were that Bell's actions demonstrated bad faith.

The *Kimmelman* Court also indicated that the ability of the defendant to pay the penalty and the amount of profit obtained from the unlawful advertising in connection with the magnitude of the penalty needed to deter the behavior is another factor to be considered when assessing the appropriations of a penalty. In this case the penalty does not significantly exceed the unlawful profits especially when considering the expense

[3] "I.D. 1" refers to the Initial Decision of the ALJ decided on May 13, 1991 in OAL Docket No. TRP-9566-89.

of prosecuting this case as noted by the ALJ. Since the penalty in this case of $218,900 is very close to $216,000, the amount of unlawful revenue generated from the billboard, it is clear that Bell had profits from which to pay his penalty. (I.D. p. 10).

The remaining relevant factor in *Kimmelman* is prior violations and deterrence. Since 1984, Bell has been ordered to remove seven other billboards on wetlands violations grounds. (ALJ Reback, SA3531-83, 6-30-84 adopted by DEP Commissioner 8-2-84, affirmed by Appellate Division 10-22-85 in A-1074-84T6). The billboards remained unmoved in April 23, 1993. Bell's attempt to reopen earlier cases was barred by ALJ Sullivan in TRP-935-90. Further there remains open another billboard violations case on remand before ALJ Sullivan from the Appellate Division to determine penalties. (TRP-6226-93).

Bell claims in his exceptions that a reduction in the amount of the penalty is warranted based upon his inability to pay. Further, his exceptions claim that his net income as opposed to his gross income derived from the unlawful billboard should be considered when assessing the appropriateness of the penalty. As noted in the DOT's opposition brief, the penalty has been properly calculated beginning December 6, 1989 and this has been affirmed by the Appellate Division. The DOT's opposition brief points out that the Appellate Division utilized gross income as the proper measure of income in this case and the brief further points out that penalties based upon gross income are consistent with another New Jersey case. *New York Advertising Co. v. New Jersey Department of Transportation*, 93 *N.J.A.R.*2d (TRP) 1 (1993). Significantly, Bell has had within his power since 1989 the ability to reduce the penalty amount by complying with DOT regulations and he chose not to do so.

The suggestion in Bell's reply brief, received January 5, 1995, that the original permit in this case should be reopened and reinstated is meritless. His claim in his exceptions that the Initial Decision of the OAL dated November 28, 1994 is mooted by the revocation or lapse of two permits for billboards that were too close to Bell's unlawful billboard is also completely without merit. Additionally, Bell claims that he now agrees to comply with the size requirements for his billboard which has been nonconforming and unlawful since 1989. Bell's sudden recognition of his noncompliance with DOT regulations does not eliminate his five year nonconformance with DOT regulations. The merits of this case were decided and affirmed by the Appellate Division in all respects except as to the specific penalty amount to be imposed. The merits have already been decided and any relitigation of the issues is barred by *res judicata*, and the entire controversy doctrine. The only issue to be decided here is one of penalty.

IT IS ON THIS 13th day of January, 1995, ORDERED that Wesley K. Bell owner of Wes Outdoor Advertising shall pay the sum of $218,900 to the State of New Jersey and remove the billboard within 10 days of this Final Decision. If Bell does not remove the billboard, DOT may exercise its right to enter upon Bell's property, remove the billboard and assess against Bell the costs of removal.

STATE OF NEW JERSEY
DEPARTMENT OF
TRANSPORTATION
s/ FRANK J. WILSON
FRANK J. WILSON
Commissioner of Transportation

DATED: January 13, 1995

Order of Enforcement of Superior Court of New Jersey, Chancery Division, Dated February 28, 1995

WES OUTDOOR ADVERTISING CO.
RECEIVED
MAR 10 1995
DIV. OF BELL INDUSTRIES

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION, ATLANTIC COUNTY
DOCKET NO. ATL-C-47-94

Civil Action

ORDER OF ENFORCEMENT

DEBORAH T. PORITZ
Attorney General of New Jersey
Attorney for Plaintiff
Richard J. Hughes Justice Complex
CN 114
Trenton, New Jersey 08625-0114
By: Stuart A. Brooks
Deputy Attorney General
(609) 292-0730

STATE OF NEW JERSEY, By the COMMISSIONERS OF TRANSPORTATION,
Plaintiff,

v.

WES OUTDOOR ADVERTISING CO.,
Defendant.

This matter having been brought by Plaintiff pursuant to *R.* 4:67-6 to enforce a final agency order; and proper service having been made; and the Court having considered the written and oral arguments of Plaintiff and Defendant; and the Court having found that Defendant's arguments to the merits of underlying the final agency order are barred by the entire controversy doctrine and *R.* 4:67-6; and for other good cause shown;

IT IS THEREFORE, on this 28 day of Februarv 1995

ORDERED THAT:

1. Within 30 days of February 16, 1995, Defendant shall remove the outdoor advertising sign as required by the Final Order of the Commissioner of Transportation.

2. In the event that the outdoor advertising sign is not removed within the time specified in paragraph 1, Plaintiff may enter upon the defendant's property and remove the sign.

3. If Plaintiff removes the sign pursuant to paragraph 2, Defendant shall reimburse to the Plaintiff its costs to remove the sign and shall do so within thirty (30) days of Defendant's receipt of the State's request for reimbursement.

s/ L. ANTHONY GIBSON
L. Anthony Gibson, J.S.C.

It is further ordered that the drafter of this order submitted copy to all (illegible).

Illegible
3/16/95

**Superior Court of New Jersey,
Order Denying Stay, Dated
March 16, 1995**

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION, ATLANTIC COUNTY
Docket No. ATL-C-47-94

CIVIL ACTION

ORDER DENYING STAY

DEBORAH T. PORITZ
Attorney General of New Jersey
Attorney for Plaintiff
Division of Law/Transportation
Richard J. Hughes Justice Complex
Market and New Warren Streets
CN 114
Trenton, New Jersey 08625
By: Stuart A. Brooks
Deputy Attorney General
(609) 292-0730

STATE OF NEW JERSEY, by the
COMMISSIONER OF TRANSPORTATION,
Plaintiff,

v.

WES OUTDOOR ADVERTISING CO.,
Defendant.

This matter having been brought by Defendant as an emergent motion to Amend or Stay an order of this Court; and the Court having considered the written and oral arguments of Plaintiff and Defendant; and for other good cause shown;

IT IS THEREFORE, on this 16th day of March, 1995

ORDERED THAT Defendant's application for a stay and for amendment of the Court's Order of Enforcement of February 28, 1995 is denied.

s/ L. ANTHONY GIBSON
L. Anthony Gibson, J.S.C.

The withholder is in accordance with the court's (illegible)

Appellate Division, Order of Stay
A-3340-94T2, Dated March 17, 1995

ORDER ON EMERGENT APPLICATION

REC'D
APPELLATE DIVISION
MAR 17 1995
ILLEGIBLE
CLERK

FILED
APPELLATE DIVISION
MAR 17 1995
ILLEGIBLE
Clerk

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A3340-94T2
MOTION NO. M-4170-94
BEFORE PART: E
JUDGE(S): Pressler
Conley
Newman

NEW JERSEY DEPARTMENT
OF TRANSPORTATION,

Respondent,

v.

WES OUTDOOR ADVERTISING,

Appellant.

EMERGENT APPLICATION FILED:	March 16, 1995	BY: Wesley K. Bell
ANSWER(S) FILED:	March 16, 1995	BY: Stuart Brooks, DAG

APPEARANCE ONLY: Telephone conference on March 17, 1995

O R D E R

THIS MATTER HAVING BEEN ARGUED BEFORE THE COURT, IT IS ON THIS 17th DAY OF March, 1995, HEREBY ORDERED AS FOLLOWS:

	GRANTED	DENIED	OTHER
EMERGENT APPLICATION FOR Stay pending appeal	(X)	( )	( )

SUPPLEMENTAL: Without prejudice in the event the Bankruptcy Court lifts the automatic stay.

FOR THE COURT:

s/ ERMINIE L. CONLEY
ERMINIE L. CONLEY, J.A.D.

I hereby certify that the foregoing is a true copy of the original on file in my office.

s/ Illegible
Clerk

Appellate Division Refusal to Lift Stay, Docket No. A-3340-94T2, Dated May 15, 1995

ORDER ON MOTION WHEN CROSS MOTION FILED

REC'D
APPELLATE DIVISION
MAY 15 1995
ILLEGIBLE
Clerk

FILED
APPELLATE DIVISION
MAY 15 1995
ILLEGIBLE
Clerk

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-003340-94T2
MOTION NO. M-004502-94
BEFORE PART: E
JUDGE(S): PRESSLER
CONLEY
NEWMAN

NJ DEPARTMENT OF TRANSPORTATION

VS

WES OUTDOOR ADVERTISING

CORRECTED:	APRIL 6, 1995	DEPT OF
MOTION FILED:	MARCH 27, 1995	BY: TRANSPORTATION
ANSWER(S) FILED:	APRIL 17, 1995	BY: WESLEY K. BELL
SUBMITTED TO COURT:	MAY 10, 1995	

O R D E R

THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT, IT IS ON THIS 11th DAY OF May, 1995, HEREBY ORDERED AS FOLLOWS:

	GRANTED	DENIED	OTHER
MOTION BY RESPONDENT - FOR RECONSIDERATION	( )	(X)	( )

SUPPLEMENTAL:

FOR THE COURT:

s/ SYLVIA B. PRESSLER
SYLVIA B. PRESSLER P.J.A.D.

I hereby certify that the foregoing is a true copy of the original on file in my office.

s/ ILLEGIBLE
Clerk

JUNEL

Superior Court of New Jersey, Appellate Division Decision Docket No. 3340-94T2, Dated December 17, 1996

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-3340-94T2

FILING DATE
APPELLATE DIVISION
DEC 17 1996
ILLEGIBLE
Clerk

STATE OF NEW JERSEY, by the COMMISSIONER OF TRANSPORTATION,
Petitioner-Respondent,

v.

WES OUTDOOR ADVERTISING,
Respondent-Appellant.

Argued November 18, 1996—Decided DEC 17 1996

Before Judges Havey and Eichen.

On appeal from a Final Administrative Decision by the Department of Transportation.

Appellant Wesley K. Bell[1] argued the cause *pro se* (Mr. Bell on the brief).

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[1] Wes Outdoor Advertising Company appears to be a sole proprietorship owned by Mr. Bell.

Stuart A. Brooks, Deputy Attorney General, argued the cause for respondent (Peter Verniero, Attorney General of New Jersey, attorney; Mary C. Jacobson, Assistant Attorney General, of counsel; Mr. Brooks, on the brief).

PER CURIAM

Wes Outdoor Advertising Company appeals from a January 13, 1995 order of the Commissioner of the Department of Transportation (DOT) assessing $218,900 in penalties against appellant.

Appellant raises the following points:

Point I—Changed circumstances require reinstatement of Bell's permit.

Point II—The decisons in this case are interlocutory and are reviewable by this court.

Point III—The ALJ [erred] on controlling issue of misrepresentations.

Point IV—The ALJ [erred] on size non-conformity laws.

Point V—The ALJ [erred] in her judgment of the State['s] knowledge of the proposed billboard location.

Point VI—The ALJ [erred] on survey information.

Point VII—The ALJ [erred] on Resorts permit information.

Point VIII—The ALJ [erred] on tax lot application.

Point IX—The ALJ [erred] on tax lot information.

Point X—The present billboard does not violate Highway Beautification Act.

Point XI—State's conduct amounts to a taking without compensation.

Point XII—Right to cure violation is a statutory one.

Point XIII—D.O.T.'s outrageous use of false information and fraud, [warrants] action by this court.

Point XIV—The ALJ [erred] in findings on controlling issues as a result of the State['s] wrongful representations.

Point XV—No health or safety factors.

Point XVI—The ALJ's penalty hearing without a jury violates due process.

Point XVII—Court should reconsider all issues in this case.

Point XVIII—Denial of certification does not constitute an expression on the merits.

Point XIX—Letters of exceptions are repeated in support of this appeal.

Point XX—Wrongful conduct by State officials entitles defendant to reimbursement of legal fees, revenue losses and damages.

We reject the contentions and affirm.

This matter has a protracted procedural history. In July 1986, appellant applied for an outdoor advertising permit to construct a billboard abutting Route 30 in Absecon. After an initial denial of the application by the DOT, the permit was ultimately issued allowing appellant to build a 1,000 square-foot billboard 300 feet east of the Delilah Road overpass. Appellant constructed a sign of approximately 1,100 square feet, located 478 feet from the overpass.

The DOT notified appellant that the billboard violated its regulations. Appellant thereupon challenged the regulations. An investigation ensued during which

the DOT discovered that the billboard in fact had been erected at the wrong location and that appellant did not own the land. The DOT notified appellant to remove the billboard. Appellant took exception to the DOT's directive that it remove the sign, and the matter was submitted to an administrative law judge as a contested case.

By initial decision dated May 13, 1991, the ALJ concluded that appellant had obtained the permit by fraudulently representing to the DOT that it owned the property. The ALJ further determined that the billboard was oversized and had been constructed 478 feet east of Delilah Road, when the permit authorized a 300-foot distance. The Commissioner adopted the findings of the ALJ on August 9, 1991 and ordered that the sign be removed within ten days. The Commissioner also ordered appellant to pay a penalty of $50 per day for the first thirty days of violation, $100 per day for the next thirty days, and $200 per day thereafter until the sign was removed, with the penalty accruing beginning on December 6, 1989.

Appellant appealed the Commissioner's order. We affirmed but remanded to determine the precise amount of penalty based on appellant's representation at oral argument before us that income from the billboard ceased in 1992. *New Jersey Dep't. of Transp. v. Wes Outdoor Adversting Co.*, A-6292-90T3 (App. Div. Mar. 31, 1993).

The hearing on remand was originally scheduled for August 17, 1994. On that date, Mr. Bell's wife telephoned the court reporting that he had been admitted to the hospital "feeling ill." Although the DOT's witnesses were in attendance, the ALJ adjourned the hearing until September 7, 1994.

On September 6, 1994, at 4:00 p.m., Bell telephoned the court and advised that he would not appear for the September 7 hearing because "his physician said he should have no stress for 30 days, including hearings." The ALJ directed him first to seek consent from the Deputy Attorney General; Bell called back and, according to the Attorney General, misrepresented that he had obtained the consent. The ALJ rescheduled the hearing for October 19, 1994, because Bell said that he would be out of the country until then.

On October 5, 1994, Bell sought another adjournment, again on the ground that his physician directed him to avoid stress for sixty days. The ALJ denied this request, noting the history of the case,[2] the fact that payment of the penalty would cause stress whenever it occurred, and that no physician had specified any condition which would preclude attendance "at a half day of a limited issue hearing." The judge found that Bell's request was "for the purpose of delay" and warned him that the State's evidence would be received *ex parte* if he failed to appear.

On the morning of the hearing, October 19, 1994, "a hospital emergency room worker" called the court to report that Bell was there, but would not divulge any other facts.[3] As promised, the ALJ received the DOT's

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[2] The DOT requests this court to take judicial notice, *N.J.R.E.* 201(b), of appellant's "extraordinary" litigation schedule during this period in which he alleged that he could endure no stress. Between August 19, 1994 and November 22, 1994, appellant apparently filed eight sets of pleadings, including briefs and an emergent motion, and made two appearances, for oral argument and an administrative hearing.

[3] It later appeared from hospital records that he was hospitalized for two days for "hypertension."

proofs *ex parte*; they were limited to documents showing payments to appellant for advertising on the illegal billboard, and the DOT's "reiteration" of its penalty calculation based on these payments. The documents were properly authenticated, and revealed the following facts.

The Showboat Casino and Hotel, with which appellant contracted to advertise on its billboard, paid $6,000 monthly to appellant from November 1989 through January 1993, for a total of $216,000. Based on this information, the DOT calculated the penalty to be $218,900. The ALJ advised appellant to file an affidavit in response, ordered that the record would close on November 10, 1994, and warned that no extensions would be granted.

On November 9, 1994, appellant filed a response unsworn as to any facts, with numerous "exhibits" in which it claimed simply that its contract with Showboat terminated December 10, 1992. The ALJ noted that this date differed not only from the proofs but also from that which appellant had provided to this court during appellant's prior appeal.

On November 17, 1994, the ALJ issued her initial decision imposing a $218,900 penalty, noting that the amount "closely tracks the unlawful gain . . . ."

We affirm substantially for the reasons expressed by the Commissioner, whose decisions adopted the comprehensive findings of fact and conclusions of law made by the ALJ. We are satisfied that sufficient evidence appears in the record to support the Commissioner's findings and conclusions. *See Henry v. Rahway State Prison*, 81 *N.J.* 571, 579-80 (1980); *New Jersey Dep't of Envtl. Protection v. Occidental Chem. Corp.*, 288 *N.J. Super.* 458, 462-63 (App. Div. 1995). However, we add the following.

Essentially, most of the points raised by appellant represent its attempt to relitigate the legality of its billboard permit and its underlying liability for the penalty. These issues have been fully and fairly resolved and upheld on appeal. Appellant is therefore barred from presenting them again by the doctrine of the law of the case. " '[W]here there is an unreversed decision of a question of law or fact made during the course of litigation, such decision settles that question for all subsequent stages of the suit.' " *State v. Hale*, 127 *N.J. Super.* 407, 410 (App. Div. 1974) (quoting *Wilson v. Ohio River Co.*, 236 *F. Supp.* 96, 98 (S.D.W.Va. 1964)). The doctrine reflects the sound policy that issues litigated and decided in a particular case should not be revisited. *Ibid.* Invocation of the "law of the case" doctrine is addressed to the sound discretion and "good sense" of the court. *Id.* at 411.

A court should exercise its power to reopen issues in contravention of this rule sparingly, and only where the first decision was clearly erroneous, or to prevent manifest injustice. *Polidori v. Kordys, Puzio & Di Tomasso*, 228 *N.J. Super.* 387, 394 (App. Div. 1988). Where the rule applies to an issue which was the subject of a previous appellate decision, the doctrine is even more stringent and requires, for example, an intervening and retroactive change in the law to permit reexamination of that issue. *Sisler v. Gannett Co., Inc.*, 222 *N.J. Super.* 153, 160 (App. Div. 1987), *certif. denied*, 110 *N.J.* 304 (1988). The doctrine applies here and bars appellant's repetitive contentions.

Appellant raises for the first time the argument that "changed circumstances" require reinstatement of its permit and the vacating of the penalty. As we understand the record, this argument has its genesis in

papers submitted to the Commissioner after the ALJ's determination on remand concerning the quantum of the penalty. Essentially, appellant argued to the Commissioner that the matter should be remanded for additional hearings because previously existing permits for unbuilt signs that flanked its property had been revoked. Specifically, appellant pointed out that previous permits held by Fifty Acres and Resorts International had either been revoked or not renewed. It reasoned that these permits originally prevented its location from conforming with spacing regulations, and their subsequent revocation enabled it to construct a sign on its lot which would conform to all spacing requirements.

The Commissioner did not directly address this point. In any event, the argument is unavailing. The fact that the flanking permits may no longer exist does not alter the underlying facts and violations which caused the Commissioner to order appellant to remove its billboard. As the Commissioner persuasively argues, the billboard is still oversized and the fact that appellant obtained a permit to erect a sign 300 feet from Delilah Road, but built it 478 feet from the road, remains unchanged. Also, as the Commissioner pointed out at oral argument, the sign apparently does not conform with DOT zoning requirements. Billboard signs are only permitted in areas zoned industrial or commercial, *N.J.A.C.* 16:41C-3.2(a)(17); the subject property is zoned conservation-recreation. Thus, appellant failed to demonstrate a sufficient basis for a remand on the "changed circumstances" issue.

We also reject appellant's challenges to the procedure conducted by the ALJ after our remand. Obviously, appellant was not entitled to a jury trial, as it now contends. *See N.J.S.A.* 52:14B-10c. Further, it was

proper for the ALJ to conduct the remand hearing in a summary manner since, as she concluded, appellant's evident purpose in seeking yet another adjournment was to delay the imposition of a penalty for as long as possible. Its numerous requests for adjournments and extensions were also accompanied by refusals to adhere to timetables or to provide discovery.

N.J.A.C. 1:1-14.6(d) provides the ALJ with the authority to "convert any form of proceeding into another, whether more or less formal[.]" It is well settled "that where no disputed issues of material fact exist, an administrative agency need not hold an evidential hearing in a contested case." *Frank v. Ivy Club*, 120 *N.J.* 73, 98 (1990), *cert. denied sub nom., Tiger Inn v. Frank*, 498 *U.S.* 1073, 111 *S.Ct.* 799, 112 *L.Ed.*2d 860 (1991); *Cunningham v. Department of Civil Serv.*, *69 N.J.*, 13, 24-25 (1975). That appellant maintained that such a dispute existed is not dispositive; the dispute must be both real and material. *Frank, supra*, 120 *N.J.* at 98.

Despite appellant's absence from the hearing, the ALJ directed appellant to submit an affidavit properly establishing such a dispute. *Cunningham, supra*, 69 *N.J.* at 25, by contradicting the DOT's evidence. In response, appellant sent only a letter, unsworn as to any fact and unaccompanied by any relevant documentation. Therefore, the record reveals no material dispute which required resolution in a plenary hearing. To the extent that the proceeding lacked formality, this was a direct result of appellant's own behavior.

Finally, we reject appellant's claim that the ALJ erred factually in determining the amount of "gross income" received by it for the use of the billboard, and its ability to pay the penalty. Predictably, these representations are unadourned by any reference to the

record. It cites unpersuasive authority for the proposition that its penalty is not proportional, and argues that the ALJ's failure to adjourn the hearing for a third time "is evidence of the intemperate mind behind the confiscatory penalty she has recommended." Finally, it asserts that "each day [of violation] is not necessarily to be deemed to be a separate offense." We reject these arguments because abundant credible evidence exists in the record as a whole to support the Commissioner's findings. *See Henry, supra,* 81 *N.J.* at 579-80.

Affirmed.

I hereby certify that the foregoing is a true copy of the original on file in my office.

s/ (ILLEGIBLE)
Clerk

Superior Court of New Jersey,
Appellate Division Decision Docket A-3505-94T2,
Dated December 17, 1996

NOT FOR PUBLICATION WITHOUT
THE APPROVAL OF THE APPELLATE
DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-3505-94T2

FILING DATE
APPELLATE DIVISION
DEC 17 1996
ILLEGIBLE
Clerk

STATE OF NEW JERSEY, by the
COMMISSIONER OF TRANSPORTATION,
Plaintiff-Respondent,

v.

WES OUTDOOR ADVERTISING CO.,
Defendant-Appellant.

Submitted November 18, 1996—Decided DEC 17 1996

Before Judges Havey and Eichen.

On appeal from Superior Court of New Jersey, Chancery Division, Atlantic County.

Appellant Wesley K. Bell[1] submitted a *pro se* brief.

---

[1] Wes Outdoor Advertising Company appears to be a sole proprietorship owned by Mr. Bell.

Peter Verniero, Attorney General of New Jersey, attorney for respondent; Mary C. Jacobson, Assistant Attorney General, of counsel; Stuart A. Brooks, Deputy Attorney General, on the brief).

PER CURIAM

Appellant Wes Outdoor Advertising Company appeals from a February 28, 1995 Chancery Division order requiring it to remove its billboard located adjacent to Route 30 in Absecon. The Chancery Division order enforces an August 9, 1991 administrative order entered by the Commissioner of the Department of Transportation (DOT) directing appellant to remove the sign within ten days. The DOT's order had been affirmed by us by *per curiam* opinion dated March 31, 1993 (A-6292-90).[2]

On appeal, Wes Outdoor Advertising raises the following points:

> *Point I*—Judge Gibson should not have issued his order while this matter was pending appeal for "changes in circumstances and newly discovered evidence of controlling effect."
>
> *Point II*—Constitutional challenges are not out of time.

We have considered the contentions and supporting arguments and are satisfied they are clearly without merit. *R.* 2:11-3(e)(1)(E). We affirm substantially for the reasons expressed by Judge Gibson in his thorough oral opinion rendered on February 16, 1995. *See N.J.A.C.*

---

[2] We remanded on the issue of penalty only. The penalty fixed by the Commissioner after remand is the subject of a companion appeal, *see New Jersey Department of Transportation v. Wes Outdoor Advertising Co.*, A-3340-94T2.

16:41C-10.4(a); *R.* 4:67-6(b)(1); *Cogdell v. Hospital Center at Orange,* 116 *N.J.* 7, 26-27 (1989); *State, DEPE v. Dopp,* 268 *N.J. Super.* 165, 175 (App. Div. 1993); *State Farm Mut. Auto. Ins. Co. v. State Dep't of the Public Advocate,* 227 *N.J. Super.* 99, 132 (App. Div. 1993), *aff'd,* 118 *N.J.* 336 (1990); *State v. Hale,* 127 *N.J. Super.* 407, 410 (App. Div. 1974).

Affirmed.

I hereby certify that the foregoing is a true copy of the original on file in my office.

s/ (ILLEGIBLE)
Clerk

Superior Court of New Jersey,
Order, Docket No. A-3340-94T2,
Dated December 17, 1996

ORDER ON MOTION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3340-94T2
MOTION NO. M-1354-95
BEFORE PART: G
JUDGE(S): HAVEY
EICHEN

FILING DATE
APPELLATE DIVISION
DEC 17 1996
(ILLEGIBLE)
Clerk

NJ DEPARTMENT OF TRANSPORTATION

VS.

WES OUTDOOR ADVERTISING

MOTON FILED:	OCTOBER 23, 1995		
ANSWER(S) FILED:	NOVEMBER 8, 1995		
RESUBMITTED:	NOVEMBER 18, 1996	BY:	WESLEY K. BELL
SUBMITTED TO COURT:	NOVEMBER 13, 1995	BY:	TRANSPORTATION DEPT OF

O R D E R

THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT, IT IS ON THIS 10th DAY OF December, 1996, HEREBY ORDERED AS FOLLOWS:

	GRANTED	DENIED	OTHER
MOTION BY APPELLANT -FOR SANCTIONS AND RELIEF	( )	(xx)	( )

SUPPLEMENTAL:

Our March 17, 1995 order was entered "[w]ithout prejudice in the event the Bankruptcy Court lifts the automatic stay." At the time, appellant's petition for bankruptcy was pending. The Department interpreted the order to permit it to proceed with the enforcement of the order entered by Judge Gibson (*see* A-3505-94T2) by removal of the sign after appellant's bankruptcy petition was dismissed. We find no evident bad faith on the Commissioner's part in so interpreting our stay order.

In any event, we have affirmed both Judge Gibson's order (*see* A-3503-94T2) and the Commissioner's order imposing sanctions (*see* A-3340-94T2). Consequently, the Commissioner's right to remove the sign is now settled.

FOR THE COURT:

s/ JAMES M. HAVEY
JAMES M. HAVEY P.J.A.D.

JUNEL

Order of Supreme Court of New Jersey, Dated April 23, 1997

SUPREME COURT OF NEW JERSEY
September Term 1996
M-1084/1085 FILED
43,456 APR 24 1997
STEPHEN W. TOWNSEND
CLERK

NEW JERSEY DEPARTMENT
OF TRANSPORTATION,
Plaintiff-Respondent,

v.

WES OUTDOOR ADVERTISING CO.,
Defendant-Movant.

O R D E R

This matter having been duly presented to the Court, it is ORDERED that the Motion for disqualification of Chief Justice (M-1084) is denied; and it is further

ORDERED that the motion for reconsideration (M-1085) is denied.

WITNESS, the Honorable Deborah T. Poritz, Chief Justice, at Trenton, this 23rd day of April, 1997.

s/ STEPHEN W. TOWNSEND
CLERK OF THE SUPREME COURT

I hereby certify that the foregoing is a true copy of the original on file in my office.

s/ STEPHEN W. TOWNSEND
CLERK OF THE SUPREME
COURT OF NEW JERSEY

A-311-95

Corrected Order of the Supreme Court of New Jersey, Dated April 23, 1997, Filed July 24, 1997

SUPREME COURT OF NEW JERSEY
September Term 1996
M-1665/1666
44,455

FILED
JUL 24 1997
STEPHEN W. TOWNSEND
CLERK

CORRECTED ORDER

STATE OF NEW JERSEY,
COMMISSIONER OF TRANSPORTATION,
Plaintiff-Respondent,

v.

WES OUTDOOR ADVERTISING CO.,
Defendant-Movant.

This matter having been duly presented to the Court, it is ORDERED that the motion for reconsideration (M-1665) is denied; and it is further

ORDERED that the motion for disqualification of Chief Justice (M-1666) is denied.

WITNESS, the Honorable Deborah T. Poritz, Chief Justice, at Trenton, this 23rd day of April, 1997.

s/ STEPHEN W. TOWNSEND
CLERK OF THE SUPREME COURT

I hereby certify that the foregoing is a true copy of the original on file in my office.

s/ STEPHEN W. TOWNSEND
CLERK OF THE SUPREME COURT
OF NEW JERSEY

New Jersey Department of Transportation
Revocation of Fifty Acres Permit,
Dated May 31, 1994

(SEAL)

New Jersey
Department of Transportation
1035 Parkway Avenue • CN 600 • Trenton, New Jersey 08625-0600
Christine Todd Whitman, Governor Frank J. Wilson, Commissioner

DLR #121320

NOTICE OF REVOCATION

May 31, 1994

Fifty Acres Parcel 3 & 4
Lahn Building
Route 70 & 93 Circle
P.O. Box 248
Marlton, New Jersey 08053

RE: Revocation of Outdoor Advertising Permit
Application Number 47910
Route U.S. 30 S/S. Milepost
300 Feet E/O Delilah Road Overpass
Absecon City, Atlantic County

Gentlemen:

A recent field inspection has revealed that the subject permitted location is unbuilt. The site does not conform to the requirements of N.J.A.C. 16:41C-3.2(a)17, because the area is zoned CR-Conservation-Recreation District. Off-premise advertising signs will be permitted only in zoned or unzoned commercial or industrial areas.

This letter serves as formal notice of the Department's intent to revoke permit application number *47910*, because N.J.A.C. 16:41C-9.1(a) grants the protection of nonconforming status only to existing, lawfully erected signs.

You may, within thirty days of the date of this letter, file a written protest to this office, stating the reason for protest, and/or file a written request with the Administrator of Outdoor Advertising to schedule either an informal hearing or a formal hearing on the matter.

Failure to do this by *June 30, 1994,* will be regarded as your acceptance of this revocation, and this permit will be deleted from your inventory.

If you have any questions, please call me at (609) 530-3761.

Very truly yours,

s/ MICHAEL J. McGUIRE
Michael J. McGuire
Supervisor of Outdoor Advertising
Office of Outdoor Advertising Services

MJM:pmn
CERTIFIED

7-5-94
No response. Please delete
(Illegible)

bc:w/app #47910 (Green) N.O.R.
Chuck

New Jersey Department of Transportation
Rejection of Application, Dated
October 27, 1994

(SEAL)

New Jersey
Department of Transportation

Office of Outdoor Advertising Services • CN 618 • Trenton, New Jersey 08625-0618

Christine Todd Whitman, Governor **Frank J. Wilson**, Commissioner

WES OUTDOOR ADVERTISING CO.
RECEIVED
OCT 31 1994
DIV. OF BELL INDUSTRIES

October 27, 1994

Wes Outdoor Advertising Company
P.O. Box 538
Manahawkin, New Jersey 08050

Attention: Wesley K. Bell, Owner/Manager

Re: Permit Application
Route U.S. 30 S/S, Milepost 54.15 E.E.
Approximately 460 Feet E/O Delilah Road Overpass
Block 226.01, Lot 2
Absecon City, Atlantic County

Dear Mr. Bell:

Please find enclosed the subject application that you hand delivered on Monday, October 24, 1994, and your check, number 1887, in the amount of $200, which are being returned to you.

As you are aware, there already exists a sign structure at the proposed location. The rights of that sign to remain have already been litigated through the entire

N.J. Court system and the U.S. Supreme Court. Additionally, there is currently a motion before Judge Anthony Gibson, Superior Court, Atlantic County, to issue an order for the removal of that structure.

Until such time as the Court rules on this motion, we feel it would be inappropriate to accept another application at this site.

If you have any questions, please call me at (609) 530-3761.

Very truly yours,

s/ MICHAEL J. McGUIRE
Michael J. McGuire
Supervisor of Outdoor Advertising
Office of Outdoor Advertising Services

Enclosures: 2
CERTIFIED

Bell's Objection and Demands for Hearings to Administrative Law Judge, Dated November 8, 1994

Nov. 8th - 1994

Naomi Dower-La Bastille, A.L.J.
R2 Box 69
Woodstown, NJ 08098

Re: D.O.T. v. WES OUTDOOR
OAL DKT NO. TRP 4425-94

to Judge Bastille,

I hereby object to your Notice & ORDER dated October 21st, 1994, in the following. . .

OBJECTION #1

On October 19th - 1994 I was enroute to your Court Room when I suffered ill conditions which included dizzyness and was impairing my driving abilities.

I turned off Route 72 into Southern Ocean County Hospital Emergency Room. (see attached article FIRST for 6-20-94 on Blood Pressure Dangers #2)

Because my Blood Pressure was 201 over 130 (stroke level), the Doctors immediately admitted me and I was not released until Friday Morning October 21st-1994. At the time of my admission I asked my Doctor to call your court office and advise them of the situation.

The admitting Doctor Ayelis Arrenas informed me that he or his staff called "you and that you were extremely nasty over the telephone."

Dr. _____ also said that you were informed of my condition and that I was being admitted.

I do not have any Hospitalization Insurance and I do not enjoy paying for being Hospitalized (copy of Oct. 19th admissions attached of $2579.00) and Aug 17th admission)

I strongly object to your Holding a one sided Hearing admitting proofs without cross examination while I was lying on my back in a Hospital Bed.

I find it inconceivable that you would commit such an injustice.

OBJECTION #2

At the pre-hearing telephone conferences I advised you that I was requesting a *Trial by Jury* over the penalty portions of the Hearings guaranteed by both the U.S. and N.J. Constitutions and the case law set by the U.S. Supreme Court in *Tull v. U.S.*

You said that my requests for a JURY TRIAL could be put on the record at the beginning of the Hearings although you intended to deny that Request.

I Hereby DEMAND a Trial by JURY as guaranteed by both the U.S. and N.J. Constitutions and the case law guaranteeing a trial by Jury set forth in *Tull v. United States,* 107 S.C. 1831 (1987).

OBJECTION #3

I dispute the Testimony from the Showboat employee who testified before your honor who's identity and source of information is unknown to me.

The Billboard Contract with Showboat Casino started on Dec. 11th 1989 and terminated on Dec. 10th 1992 and I request the opportunity to cross examine this witness.

OBJECTION #4

I object to the testimony of William Norton without my ability to cross examine him on the issues that he gave to recapitulate the penalty calculation.

Mr. Norton's position probably relies on his ability to revoke my permit which he attempted to do illegally.

The Constitutions and the "Roadside Sign Control and Outdoor Advertising Act" (N.J.S. 27:5-5, et seq.) provides under Section 9 (N.J.S. 27:5-13c) that revocation of a sign permit can only be accomplished *after notice and hearing*; and in this case the hearing before your honor did not become effective until after the Commissioner of Transportation upheld your previous findings.

So at the earliest possible date that this billboard no longer held a valid permit was on _____ 19____ when the Commissioner of Transportation issue his Order upholding your decision (see court order attached from Judge GIBSON, J.S.C. on July 27th 1992 under docket No. ATL-L-3220-92 on this issue)

OBJECTION #5

This court's improper act of holding hearings while this Defendant was in the Hospital can not be justified because of his Hospitalization periods of Aug 17th 18th and 19th and October 19th 20th and 21st.

This Defendant was not just treated on Aug 17th and October 19th as the court's record my "intent" to reflect.

Your Honor was fully aware of the Defendant's condition and committed ERROR to continue a matter in his absence.

OBJECTION #6

D.A.G. positions relating to other (so called) violations are invalid since they are a total misrepresented on content and are inconclusive.

I demand an opportunity to hear the testimony and refute to witness's positions as those violations were created by William Norton and Stewart Brooks.

It is necessary to develop a record on these issues for proper review of a higher authority on appeal.

OBJECTION #7

The Holding of one sided Hearings by your honor is a total disregard for the health and safety of this litigant in violation of his Constitutional Rights.

OBJECTION #8

The set of Regulations affecting this matter are the Outdoor Advertising Tax Act which were in effect during the pendency of this matter under N.J.A.C. 16:41 A-6 et seq. The "Blue Book" is the set of Regulations governing Route U.S. 30 in the City of Absecon during the pendency of this matter.

"N.J.S.A. 27:7A-17 is the enabling statue (sic) which authorized the Commissioner to adopt N.J.A.C. 16:41-8 *et eq.* which has been referred to as the "Green Book" in this case.

N.J.S.A. 27:7A-17. PROMULGATION OF REGULATIONS: FEES AND CHARGES: DEPOSIT AND USE OF FUNDS

(a) The State Highway Commissioner is hereby authorized, following public hearings, to promulgate regulations governing the issuance of permits for

the erection and maintiance (sic) of roadside signs *within protected areas of a controlled portion of the Insterstate (sic) System,* prescribing the number, locations and types of, and specifications for roadside signs, and designating the conditions under which roadside signs may be errected and maintained; provided, however, *that such regulations shall not be more restrictive than the minimum requirements of the national standards as now promulgated or hereafter amended and promulgated by the Secretary of Commerce of the United States pursuant to Title 23, 'Highways' of the United States Code as amended.*"

TITLE 23 U.S.C. 131; delegation of authority in 49 C.F.R. 1.48(b). SECTION 750.102 DEFINITIONS provides. . .

> (c) CONTROLLED PORTION OF THE INSTERSTATE (sic) SYSTEM means any portion which:
>
> (1.) Is constructed upon any part of right-of-way, the entire width of which is acquired for right-of-way subsequent to July 1, 1956 (a portion shall be deemed so constructed if, within such portion, no line normal or perpendicular to the centerline of the highway and extending to both edges of the right-of-way will intersect any right-of-way acquired for right-of-way on or before July 1, 1956);
>
> (2.) Lies within a State, the highway department of which has entered into an agreement with the Secretary of Transportation as provided in the act; and
>
> (3.) Is not excluded under the terms of the act which provide that agreements entered into between the Secretary of Transportation and the State highway department shall not apply to those segments of the Insterstate (sic) System which traverse commercial or industrial

zones within the boundries of incorporated municipalities, as such boundries existed on September 21, 1959, wherein the use of real property adjacent to the Insterstate (sic) System is subject to municipal regulation or control, or which traverse other areas where the land use as of September 21, 1959, was clearly established by State Law as industrial or commercial."

The "GREEN BOOK" as adopted under N.J.S.C. 16:41-8.1 DEFINITIONS state the following in compliance with the enabling Federal and State laws . . .

"CONTROLLED PORTION OF THE INSTERSTATE (sic) SYSTEM"

—Any portion of an Insterstate (sic) Highway which is constructed upon any part of right-of-way, the entire width of which was acquired subsequent to July 1, 1956, excluding those segments which traverse commercial or industrial zones within the boundries of incorporated municipalities, as such boundries existed on September 21, 1959, wherin (sic) the use of real property adjacent to the Insterstate (sic) System is subject to municipal regulation or control, and which traverse other areas where the land use as of September 21, 1959, was clearly established by the laws of the State as industrial or commercial. (see Figure 1)

#FIGURE ONE Is attached as Page Four.

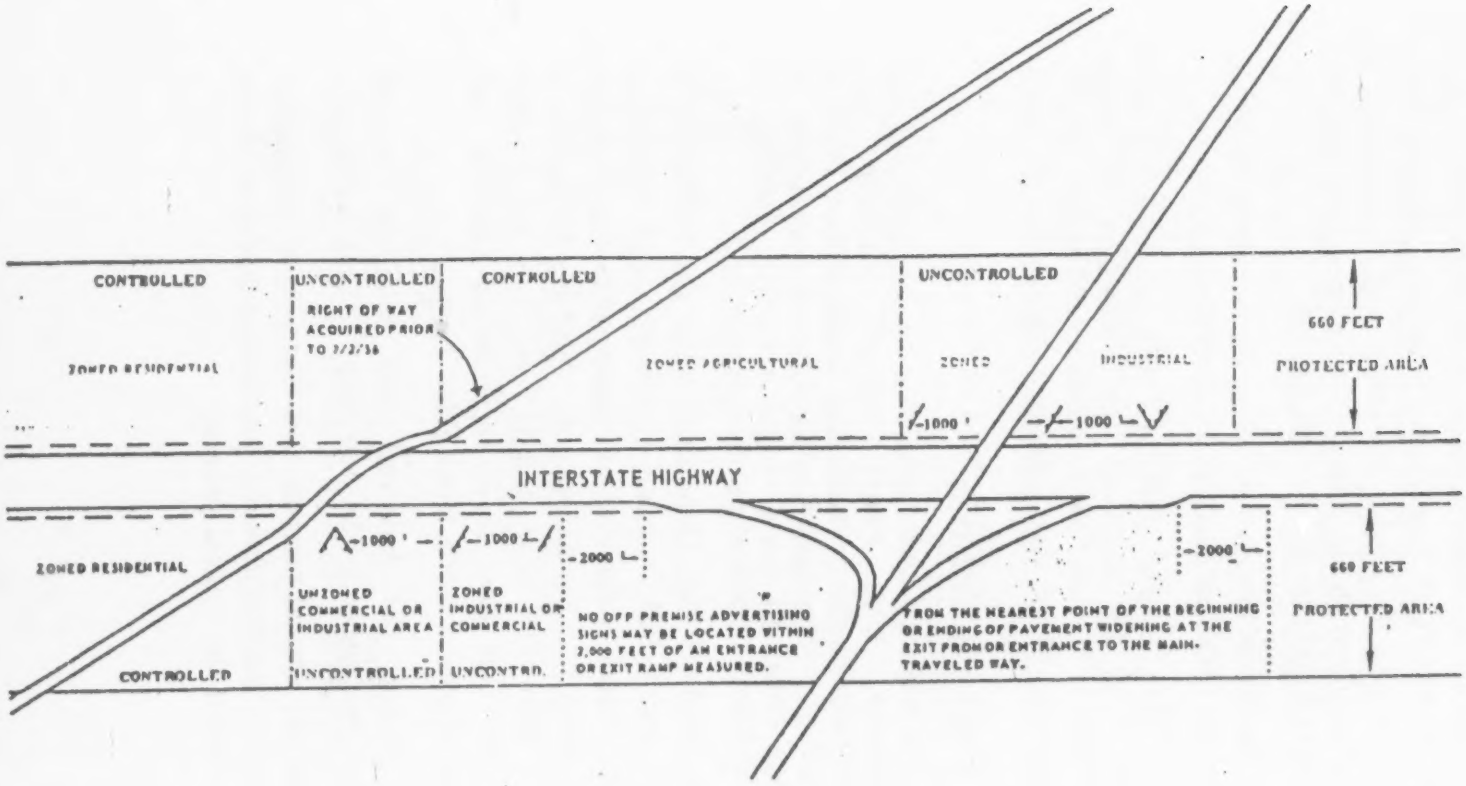
Route U.S. 30 is on Uncontrolled Portion of the Interstate System.

As a result of the aforegoing Federal and State Law, and by the Interstate Regulations, N.J.S.C. 16:41-8.1, the "Green Book" does not and can not apply to Rt. U.S. 30, since the Highway was constructed prior to July 1st, 1956.

OBJECTION #9

Penalty Regulations are not to be implemented solely on the basis of a violation constituting each day as a separate offense since such a method will cause in this case (an unreasonable amount money without the ability of Defendant to pay)

BEST AVAILABLE COPY



ADVERTISING ADJACENT TO THE INTERSTATE HIGHWAY SYSTEM

FIG. 1

In *Kingsley v. Wes Outdoor Adv. Co.*, 59 N.J. 182 the Supreme Court of New Jersey held that (this litigant) a penalty of $59,230.00 for erecting and maintaining a dozen billboards without a permit was excessive and the Court reduced the penalty to $10,000.00.

The Supreme Court of New Jersey also held in *Kimmelman v. Henkels & McCoy,* 108 N.J. 123

> "that trial courts decision with respect to civil penalty to be imposed for violations of state Antitrust Act may be overturned on appeal, where decision is based on misinterpretation of applicable law."
>
> The Court also held that:
>
> "In calculating civil penalties to be imposed for violations, trial court should consider any appropriate factors, including good or bad faith of defendant, defendant's ability to pay, amount of profits obtained from illegal activity, duration of activity and extent of public injury, etc."

In the present case Defendant built the Billboard in question with full state approval, the agencies department head came out of retirement and testified that Defendant had permissions to build his billboard on his land "wherever that might be" and he further testified that Bell had *never* represented that he had bought the adjacent lands from Fifty Acres.

Your honor dis believed the agencies retired supervisors testimony to the detriment of this defendant.

During the appeal process this Defendant obtained a stay order for the purpose of continuing his use of his billboard during the appeal process.

OBJECTION #10

Defendant Bell presently does not have the ability to pay any penalty of any amount which is presently contemplated by this court because of the harrassment of William Norton D.O.T., Stewart Brooks D.A.G. and Alice Ceseretti, D.A.G. These individuals have caused extensive litigation in this matter and several others causing a loss of income from Billboard locations on the Atlantic City Expressman, Rt. U.S. 30 (Showboat and Taj Mahal Contracts) and Rt. 72 at Beach Haven West.

This Defendant no longer has any employees.

This Defendant is behind in his Real Estate taxes on almost all of his properties in Burlington, Ocean and Atlantic Counties.

This Defendant is behind in his liability insurance accounts (copy of current statement)

This Defendant is presently behind in two mortgages.

This Defendant is presently behind in payments to five of his law firms (copies of current statements).

This Defendant is presently behind in his State and Federal Income Tax Payments.

OBJECTION #11

The Defendant (Bell) in this matter expended or obligated funds in this matter for Engineering and attorneys (legal fees) for the purpose of maintaining his D.O.T. (Permit) approval in the following amounts:

EVENS, OBSBORNE & KRIESMAN, P.C. "Copy for evidence Hearing" Billings & checks	$_____
WOLFF & SAMSON, P.C. "Copy for evidence Hearing" Billings & checks	$52,000.00 +
LEWIS, BABCOCK & HAWKINS Billings & cancelled checks (copy for evidence hearing)	$22,000.00 +
McSWEENEY & DREWES, INC. engineers "copy attached" Billing	$ 4,253.96
PONONI ASSOCIATES "copy attached" Billing	$10,428.00
BILLBOARD CONSTRUCTION "at testified in Hearing"	$63,000.00

CONCLUSION

Wherefore this Defendant's requests that this court impose no penalty in this matter as the termination of Defendant's Outdoor Advertising Permit on this site is under the circumstances, excessive in itself since the Defendant fully relied on this State Agencies approval *before* he began Billboard Construction and because his approval was granted after an informal Agency Hearing provides for in that Agencies Regulations.

There is no public injury from the extended use of this Billboard after the D.O.T. obtained a revocation of the Permit on this site while Defendant continued with his appeal process.

respectfully submitted,

s/ WESLEY K. BELL
Wesley Bell
trading as
Wes Outdoor Advertising Co.
P. O. Box 538
Manahawken, NJ 08050

copy to
Clerk of the Div.
of Adm. Law

CERTIFICATION OF SERVICE

I certify that I have hand delivered a copy of this letter to the Attorney General's Office on the 9th Day of Nov. 1994.

s/ WESLEY K. BELL
WESLEY K. BELL

Initial Decision of Office of Administrative Law of State of New Jersey, Dated November 17, 1994

(SEAL)
State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. TRP 4425-94
AGENCY DKT. NO. 89-523
(ON REMAND TRP 9566-89)

NEW JERSEY DEPARTMENT
OF TRANSPORTATION,

Petitioner,

v.

WES OUTDOOR ADVERTISING COMPANY,

Respondent.

Stuart A. Brooks, Deputy Attorney General, on behalf of the petitioner (Deborah T. Poritz, Attorney General of New Jersey)

Wesley K. Bell, respondent, *pro se*

Record Closed: November 10, 1994 Decided November 17, 1994

BEFORE **NAOMI DOWER-LABASTILLE,** ALJ, T/A:

On March 31, 1993, the Appellate Division of the Superior Court affirmed the final decision of the Commissioner of Transportation in this billboard advertising violation case. The Court remanded on the

sole issue of the specific penalty amount to be imposed on respondent (hereafter, Bell). Bell had stated at oral argument that the contract providing for $6,000 per month payment to him terminated in November 1992, thus implying that petitioner had miscalculated the per diem penalty sought. (App. Div. Dkt. A-6292-90T3). The revenue and the period over which it was received is a factor affecting the issue of whether or not the penalty assessed reasonably exceeded the amount of income the violator received from the unlawful billboard. The Department of Transportation (DOT) transmitted the matter to the Office of Administrative Law as a contested case pursuant to *N.J.S.A.* 52:14F-1 *et seq.* On May 13, 1994 the Director assigned the docket to Naomi Dower-LaBastille, ALJ, retired, as a temporary assignment.

The record in this matter closed on November 10, 1994. Initially, I scheduled a plenary hearing, but subsequently changed the procedure to a modified summary decision format. My reason for doing so is supported by the procedural history of this phase of the proceeding which is detailed below and by the entire history of the case. A complete chronology follows:

Chronology of the Case

5-9-89	DOT notices Bell of oversize violation
--89	Bell files in Superior Court Law Division alleging civil rights violation based on constitutional protection of billboard and seeks to void DOT regulations.
8-15-89	DOT notices Bell of location violation.
12-18-89	TRP 9566-89 transmitted to OAL.

3-28-90	First prehearing resulting in order including directive to Bell to request discovery by 4-20-90 for a 7-10-90 hearing date.
6-14-90	Bell sends DOT discovery requests and seeks delay of hearing.
6-18-90	Bell files for dismissal on constitutional grounds, seeking a hearing on motion.
6-20-90	ALJ notes no adjournment on grounds of pending motion.
7-10-90	Hearing
7-11-90	Hearing
8-15-90	Substituted hearing date for 7-23-90.
10-5-90	Bell attended hearing without counsel, requesting adjournment.
12-4-90	Last hearing date. Bell requests briefing extensions.
2-21-91	Record closed in TRP 9566-89.
5-13-91	ALJ files initial decision.
8-9-91	DOT final decision.
8-15-91	Bell files appeal in Appellate Division of Superior Court (A-6292-90T3), noting in statement similar issues in A-2679-90T3, TRP 935-90, TRP 3414-90, C1412-88.
8-16-91	Bell files with DOT for stay of decision.
9-10-91	DOT denies stay of penalty but grants stay of removal of billboard.

9-30-91	Bell files motion with Appellate Division to compel DOT to produce a map, to extend briefing time and to amend case statement to add a number of issues not raised below, including a discovery issue from June 1990.
10-31-91	Appellate Division denies motion to compel but grants 30 day extension for briefs.
12-9-91	Bell moves before Appellate Division to supplement record with numerous exhibits, most available at time of hearings.
4-27-92	Bell requests oral argument before Appellate Division.
3-9-93	Appellate Division oral argument.
3-31-93	Appellate Division affirms DOT except for specific penalty dollar amount.
4-8-93	Bell moves for more time to file motion for reconsideration with Appellate Division on grounds of new counsel. (Although Bell had counsel before OAL, he appeared *pro se* before Appellate Division).
5-6-93	Bell files motion for reconsideration on two issues.
--93	Appellate Division denies reconsideration. Bell files petition for certification with New Jersey Supreme Court.
9-21-93	New Jersey Supreme Court denies certification.
--93	Bell files for reconsideration.
3-22-94	New Jersey Supreme Court denies reconsideration of certification denial.

5-13-94	OAL assigns Appellate Division remand to ALJ LaBastille, TRP 6226-93.
5-19-94	DOT sends discovery request to Bell.
6-7-94	ALJ directs Bell to respond by 7-15-94.
6-7-94	Bell responds to discovery. Of three questions, Nos. 1 and 2 are not answered and No. 3 answer is incomplete.
6-15-94	DOT reiterates discovery requests.
6-22-94	Bell files with U.S. Supreme Court for writ of certiorari.
7-14-94	DOT reiterates discovery requests.
7-21-94	OAL prehearing telephone conference setting hearing date of 8-17-94 at 10 a.m.
8-17-94	After 9 a.m., Bell's wife reports he went to emergency room due to feeling ill the night before and that Bell was admitted to hospital. Hospital record shows discharge on 8-18-94. DOT and witness appear for 10 a.m. hearing which ALJ adjourned. DOT seeks discovery sanctions for information promised by Bell by 8-5-94. New, peremptory hearing date set by ALJ for 9-7-94.
9-6-94	4 p.m. Bell calls ALJ's secretary stating he will not attend hearing on grounds his physician said he should have no stress for 30 days, including hearings. He was directed to get DAG consent and then apply to ALJ. Bell called back claiming DAG consent. This was not true. DAG stated to ALJ secretary that he was waiting for a FAX of a letter from Bell's physician and had not consented.

Because it was approaching 5 p.m., ALJ directed a forced cancellation of the hearing, without granting an adjournment because Bell stated he would not appear and DOT witnesses in Atlantic City needed notice.

9-9-94 DAG spoke to Bell's physician (Dr. Ruiz) in response to an invitation to seek further information in Ruiz's letter of 9-6-94. He learned Bell solicited the letter and Dr. Ruiz stated the restrictions applied "to any activity Bell found stressful." Bell had stated he would be out of the country 10-10-94 to 10-17-94 and unavailable for hearing. ALJ thus rescheduled the case peremptorily for October 19, 1994, 10 a.m.

10-3-94 U.S. Supreme Court denies writ of certiorari in this case.

10-5-94 Bell seeks adjournment of the 10-19-94 hearing on grounds of a physician's letter that he should not participate in any stressful activities, including court hearings for 60 days. DAG opposes adjournment.

10-13-94 ALJ denies adjournment, noting the history of the case and the fact that paying over $200,000 in penalty would indeed cause acute stress, which would be no different in 60 days or 160 days and that no physician had stated a specific physical condition which would preclude attendance at a half day of a limited issue hearing. ALJ gave notice that failure to appear might result in Bell's loss of an opportunity to present evidence and the taking of evidence ex parte. The ALJ found that Bell's request was for the purpose of delay.

10-19-94 At 9:40 a.m., a hospital emergency room worker telephoned the ALJ's secretary, reporting Bell was there, but that she could not reveal any facts concerning his visit due to confidentiality rules. Bell was hospitalized two days for hypertension per hospital records.

10-19-94 The ALJ took DOT's proofs ex parte. These were limited to a Showboat witness' authentication of documents showing payments to Bell under contract for use of the billboard and DOT's reiteration of calculation of penalty using these facts.

10-21-94 ALJ gave notice to Bell to file a responding *affidavit* by 11-9-94 and legal argument, if any, applicable to penalty. The letter related proposed fact findings based on the proofs at hearing. DOT's argument at hearing including a case citation, the history of Bell's failure to provide discovery, continued noncompliance since 1993 with J.S.C. Gibson's orders to remove trim from a different oversize billboard and Bell's delays in a parallel DOT case before ALJ Sullivan. The ALJ ordered that the record close in the instant docket on November 10, 1994, with no extensions.

11-9-94 Bell files response unsworn as to any facts, with numerous "exhibits."

11-10-94 Record Closed

PROCEDURAL DECISION

I determined to proceed by modified summary decision, to which DOT agreed, for several reasons. DOT had brought two witnesses on two dates, only to find that Bell did not appear. The testimony of the Showboat Hotel and Casino head clerk for accounts payable, Gerri Harris, was solely to authenticate and summarize records. Harris, accompanied by another employee, had come from Atlantic City to Mercerville to provide this information under subpoena, due to Bell's failure to provide discovery of the same facts. Had Bell done so, petitioner could have moved for summary decision based on Bell's admissions of the billboard revenue. As for William Norton's testimony, it was a recapitulation of that presented at the 1990 hearings, updated to incorporate the complete documentation presented by Harris. Finally, the Appellate Division, in remanding, suggested the matter could proceed by stipulation because the only issue on remand was the fact issue of revenue which would be a factor in the dollar amount of penalty. Bell would neither admit the precise facts concerning revenue nor stipulate. A plenary hearing was not necessary to elicit these limited facts.

Although Bell was directed to file any facts controverting the proposed revenue findings and penalty calculation (stated below) by affidavit, he filed an unsworn statement. His statement can therefore not be used as a basis for findings. In any event, even his unsworn material does not controvert proposed revenue findings, the time period Bell provided billboard use to Showboat or the accuracy of the penalty calculation. Almost all of his material is irrelevant to the limited issue here. He did, however, include hospital generated records of admission and discharge about which there

seems no question of authenticity. Since they contain facts which are relevant to the procedural issue, I have admitted them as respondent's penalty exhibits, numbered accordingly RP-1A and B and RP-2A and B. These documents prove that Bell was hospitalized on the August 17, 1994 hearing date, complaining of heart irregularity ("syncope") for an overnight stay. (I note that in his written statement, Bell claims he stayed an extra day). The second hospital record proves Bell was admitted on the next hearing date, October 19, 1994 for a two night stay for hypertension. These facts are incorporated in my **FINDINGS** on procedural history.

Since Bell repeatedly claimed that any kind of hearing was too stressful for him to tolerate, that claim adds a further reason why this matter should be concluded by a modified summary decision format. Indeed, if Bell's concern was for his health, rather than to foster further delay, it would have made sense to admit or stipulate the uncontrovertable facts concerning revenue from the unlawful billboard and the accuracy of the penalty calculation, thus avoiding to a hearing. All legal arguments can be submitted in papers. Additionally, Bell was not too ill to make a foreign trip between his missed hearing dates. Finally, despite the plethora of "exhibits" sent by Bell, none detailed objective medical test findings of some condition precluding appearance at hearing, although quite a few included billings for such tests.

In short, my summary **FINDING**, from all the facts and circumstances of the procedural history, is that respondent's principal motivation at all times has been to delay imposition of penalty. Respondent has succeeded in delay of penalty and of removal of his unlawful billboard for five years. Taken all together, I

CONCLUDE very good cause existed to transmute these proceedings to a modified summary decision. I further **CONCLUDE** that there is no due process violation in molding this portion of the administrative proceeding to meet necessity. "... for the odd problem, difficult litigants or other unusual circumstances, the judge is sufficiently empowered to adopt the case to the situation." P. 143 §121 *Admin. Law and Practice,* Lefelt and *N.J.A.C.* 1:1-14.6(d) and (k). Bell's claim is that he was denied cross-examination of Harris and Norton. In the case of the Showboat witness, she merely presented the documents proving payment. Norton updated a calculation. What was there to cross-examine in this material? Nothing relevant, for Bell could not controvert the facts, although given the opportunity to do so. My conclusion is that there is neither a constitutional bar, nor even a fundamental fairness argument with any merit respecting my decision to proceed summarily. Surely respondent has been given all the process which was due, and more, in this administrative format.

DECISION ON PENALTY

Based on the facts elicited in the testimony, noted above, I posed the following as proposed findings to Bell:

1. During the in-force period of three annual contracts, Showboat Hotel and Casino paid $6,000 per month for use of Bell's billboard, or a total of $216,000.

2. The final month of contract use was for the period December 12, 1992 to January 11, 1993, payment for which was the up front deposit of $6,000 paid November 19, 1989. The contract was not renewed for a fourth year for unknown reasons.

3. Calculation of DOT's penalty, made in the identical fashion as provided in the initial hearing, but using the actual period of billboard use under contract is $218,900. This sum exceeds the penalty previously calculated ($212,900) because at prior hearings, it was not known that contract use continued to January 11, 1993. (An additional 30 days at $200 per day).

In Bell's unsworn response, he claimed his contract with Showboat terminated December 10, 1992. I note this is a different date from that he stated to the Appellate Division (also not under oath). Bell did not state that the total revenue was not received. As for Norton's recalculation, Bell merely interposed a legal agreement.

I now **FIND** the above proposed facts to be true.

Bell told the Appellate Division at oral argument that his contract for the billboard terminated in November 1992. It is patently clear that this was untrue. His reference was apparently to the time when he knew the contract was not to be renewed for another year. There can be no doubt that Bell received $216,000 for the unlawful use of his billboard. My findings, affirmed in all respects, in TRP 9566-89, were that Bell received notice from DOT May and August 1989 of violations. From that time forth and through January 11, 1993, Bell could at any time have limited his penalty by removing the Showboat advertising after the DOT decision in August 1991. He could have nonrenewed the contract in November 1991, after one year of payment.

As the deputy attorney general pointed out, Bell had the power to limit his penalty in his own hands, but continued in an unregenerate attitude driven by the magnitude of his unlawful gains. As DOT also pointed

out, an unpublished Appellate Division case on a similar issue (A-3879-90T2) decided February 27, 1992 in *DOT v. Northern Outdoor Advertising, Inc.* (heard below by this ALJ) found 150 percent of gain improperly secured not to be an excessive penalty.

In the instant case, the penalty calculated ($218,900) rather closely tracks the unlawful gain ($216,000) and DOT limited penalty calculation to the period during which revenues were received. Although not closely on point, *Kimmelman v. Henkels & McCoy, Inc.*, 108 *N.J.* 123 (1987), is instructive in reviewing factors for consideration in assessing per diem penalties. Matters for consideration noted include "the good or bad faith of defendant." (Id. 137). On this point, Bell fails utterly. My findings in TRP 9566-89 demonstrate bad faith. The *Kimmelman* court cite ability to pay and the amount of profits obtained from illegal advertising in connection with the magnitude of the penalty needed to deter unlawful behavior. In the instant circumstances, the penalty is no more than unlawful gains, particularly when the expense of prosecution is considered in these egregious circumstances. Bell's unsworn claims of inability to pay are demonstrated by allegedly unpaid bills from as early as 1989, before he received $216,000 in revenue from just one billboard. The only other *Kimmelman* factor relevant here, as opposed to an antitrust violation case, is the factor of prior violations and deterrence. Although I have not attempted to detail all Bell's past or concurrent billboard violations cases beyond those noted above, even as to what is seen here, Bell's response to an adjudicated violation is unregenerate and egregious. As far back as 1984, Bell had been ordered to remove seven other billboards on wetlands violation grounds. (ALJ Reback, ESA 3531-83, 6-30-84, adopted by DEP Commissioner 8-2-84, affirmed

by Appellate division 10-22-85 in A-1074-84T6). By April 23, 1993, Bell had not removed the billboards. (Discussed in DOT Commissioner's decision on TRP 935-90). In TRP 935-90 before ALJ Sullivan, Bell's attempt to reopen the earlier cases was ruled barred by ALJ Sullivan. That docket concerning still more billboard violations remains before ALJ Sullivan on remand from the Appellate Division to determine penalties (TRP 6226-93).

Bell raised numerous issues related to penalty in his eleven filed "objections." I have disposed those concerning *lack of due process* in the proceeding and the *unsworn claims* of *inability to pay* supported by allegedly unpaid bills from before and during the period he received $72,000 per year from just this one of his billboards. Nor does it go unnoticed that he took a foreign trip while pleading poverty. As for all the legal grounds to penalty stated by respondent such as invalidity of DOT regulations, *right to trial by jury* and the like, these have been decided or are deemed decided if not raised, by the Appellate Division in this case, and affirmed at all levels. I specifically note that the July 27, 1992 order of J.S.C. Gibson, supplied by Bell, has no relevance to this case, but concerns a different billboard located in Atlantic City. It is not for me to revisit any legal issues which were raised on appeal or concern other cases. It is my duty to follow the remand directives of the Appellate Division as best I can, and no more.

As I found in TRP 9566-89, Bell spent his life in the business, owns numerous billboards and is as sophisticated as they come. The injury to the public inherent here is exemplified by the old maxim "Justice delayed is justice denied." I conclude the penalty here is wholly reasonable, being little more than unlawful gains from known unlawful conduct.

I **CONCLUDE** that an appropriate penalty for the violation is $218,900, the amount calculated under DOT's per diem rules.

It is therefore **ORDERED** that respondent shall pay the sum of $218,900 to the State of New Jersey and remove the billboard within ten (10) days of a final order in this docket.

I hereby **FILE** my initial decision with the **COMMISSIONER OF THE DEPARTMENT OF TRANSPORTATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF TRANSPORTATION** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Transportation does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **Commissioner of the Department of Transportation, 1035 Parkway Avenue, CN 600, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Nov. 17, 1994 s/ NAOMI DOWER-LABASTILLE
DATE NAOMI DOWER-LABASTILLE, ALJ

Receipt Acknowledged:

11/21/94 s/ DOTTIE KISL
DATE DEPARTMENT OF TRANSPORTATION

Mailed to Parties:

NOV 28 1994 s/ JEFF S. MARIN
DATE ACTING DIRECTOR AND CHIEF
ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

slf

**Letter of Exceptions of Meth & Meth,
Dated December 7, 1994**

RECEIVED
DEC 8 1994
Division of Law
Gladys L. Wood

METH & METH
ATTORNEYS AT LAW
625 CENTRAL AVENUE
WESTFIELD, NEW JERSEY 07090
908-654-4900

Theodore Sager Meth
Karl T. Meth

Fax 908-654-5680
Parkway Exit 135

December 7, 1994

Honorable Frank J. Wilson, Commissioner
Department of Transportation
1035 Parkway Avenue
CN 600
Trenton, NJ 08625

Re: State of New Jersey Department of Trans.
v. WES OUTDOOR ADVERTISING CO.
OAL Docket No. TRP-9566-89

Dear Commissioner,

Please accept these Exceptions to the Initial Decision of the office of Administrative Law dated November 28, 1994.

First of all, that Decision has now been mooted by the revocation or lapse of the permits of Fifty Acres and Resorts International, which permits were within 300 feet of Respondent's billboard.

The Administrative Law Judge originally determined, at page 20 of her decision of May 13, 1991, that:

> *"SPACING REQUIREMENTS AND PENALTY*
>
> Respondent cannot be granted a permit for a sign 470 feet E. of the Delilah Road overpass because it would be in violation of N.J.A.C. 16:41-8.6(a)5v. His sign is within 300 feet of both the unbuilt Fifty Acres and Resorts permits, which are current, thus the only appropriate penalty pursuant to N.J.A.C. 16:41-8.15 and 8.16 for the violation of unauthorized placement and spacing violations is removal and recovery of the cost thereof."

Michael J. McGuire, Supervisor of Outdoor Advertising for N.J. D.O.T. on December 2, 1994 at 11:50 a.m. advised respondent Wesley K. Bell, trading as Wes Outdoor Advertising Co. that the permits previously held by both Fifty Acres and Resorts International are no longer in existence.

Mr. McGuire said after checking the files that Fifty Acres Permit was revoked by the N.J. D.O.T. on May 31st, 1994 and that Resorts Permit has been gone also for some time; see Exhibit A1 & A2.

Since no other permit exists within 300 feet, the permit held by respondent under APP # 55363 should be reinstated, and the D.O.T. should correct its measurement description, which then only leaves two issues outstanding: (a) that the sign area within the trim and base exceeds 60 ft. in length, and that (b) whether any penalty should be imposed.

(a) Remaining Issue

Wes originally applied for a 60 ft. billboard on July 3, 1986 under App. No. 54171 which was denied because

the N.J. D.O.T. took the position that a 1125 sq. ft. 100 ft. long permit existed on the *same site* at Pole # 13369, see Exhibit B1 & 2. At an informal hearing Representatives of the N.J. D.O.T. requested Wes to fill out application #55363 which was done in their presence and direction for a replacement 100 ft. sign, which later became the subject of this litigation, see Exhibit C. On October 24, 1994, Wes again reapplied for a 60' billboard on this site and the N.J. D.O.T. rejected that application on October 27th, 1994, see Exhibit D1, 2, 3.

Since Wes now agrees to reconstruct the Billboard to the sixty foot length, there is no longer an issue as to conformance with regulations.

(b) Remaining Issue

Since Wes' permit should and can now be reinstated, no penalty at all should be imposed. In any event, Wes erected the oversize length sign with the official approval of N.J. D.O.T. and in full reliance on that approval; Wes should not be subject to penalties for that reliance, especially since the approvals were a result of an ~~information~~ (informal) hearing of the N.J. D.O.T. as required by N.J.A.C. 16:41A-2.9-3, and 16:41-8.12-3, only one of which may apply in other regards.

Even if that reliance is deemed not to eliminate all the penalty, there are many good reasons for the reduction of the penalty, as follows:

1. The earliest that revocation could lawfully have taken place is on September 8, 1991, 30 days after the action of the Commissioner on August 9, 1991, N.J.S. 27:5-13c. Thus, under N.J.A.C. 16:41-8.16 then in force, the *maximum* penalty would be, since the sign was blank on December 11, 1992, and no revenue was received thereafter, calculated at $200 for 825 days, for a total of

$165,000. If the August 9, 1991, notice provisions as to daily penalty were applied, one would have a *maximum* penalty of $157,500.

2. The Administrative Law Judge justified her recommended penalty on the ground that Wes had income from the billboard, wholly ignoring that there were attributable *expenses* to be considered. The true test is net income, as provided in N.J.A.C. 16:41C-10.5(d). Wes provided the Judge with the data from which net income could have been calculated, as follows: $63,000. construction costs; $10,428. engineering; $4,253.96 engineering; $74,000. in (partial) legal fees; had Wes been given a proper hearing he would have developed more data by way of utility charges, income and real estate taxes, painting and other costs. In any event, if the gross income was $6000. a month for 270 months (the actual violation period, if any) or $162,000., the net income would be that figure less a figure *in excess of* $151,681.96, probably resulting in a net *loss*! This would suggest zero, or a nominal penalty, in the interest of equity and by way of abatement under N.J.A.C. 16:41C-10.5(c).

3. Respondent lacks the ability to pay a penalty in the theoretical maximum of $157,500. In its response Wes showed that it no longer has employees; that it is delinquent as to all its property taxes, liability insurance, mortgages, income taxes and other creditors. The Judge should in all fair play have ameliorated the penalty, or if she felt more documentation was required, afforded an opportunity for Wes to provide same. At this point, a nominal penalty is all that is indicated on the basis of ability to pay. (The vacation which the Judge made so much of was at no cost to Respondent.)

4. The Judge also made much of the long litigation and from it inferred "egregiousness" of violation and intentionality. But on September 10, 1991, the Commissioner of Transportation stayed the order just because he recognized that Wes was not acting egregiously; the Courts also issued stays. Surely Government may not regard recourse to adminstrative and judicial relief as a proof of a violator's state of mind, unless sanctions are being imposed, as distinguished from statutory penalties.

5. The law requires proportion. In *Kingsley v. Wes Outdoor Adv. Co.*, 59 N.J. 182 (1970), a penalty for erecting a dozen billboards *without permission* was reduced from $59,230. to $10,000.; here the billboard was erected with permission, permit being granted on March 7, 1988, and both zoning and local building permits thereafter. Construction was approved also after construction by the Department of Environmental Protection. The only problem arose when the permit was revoked because of the then existence of adjacent permits. See Exhibit E.

6. The Administrative Law Judge wrongfully refused to adjourn the penalty hearing when it was evident to her that respondent was in hospital: this alone is evidence of the intemperate mind behind the confiscatory penalty she has recommended.

7. The Administrative Law Judge, in her Initial Decision, relied on erroneous statements by Showboat, correctable on cross-examination, and on erroneous representation by a Deputy Attorney General as to other but unrelated pending cases, as for example that another case is on appeal on penalty, when no appeal was allowed because as yet interlocutory. While these matters do not have a dollar coefficient, they do suggest that penalty

should be evaluated apart from the Administrative Law Judge's reasoning. This is especially true in light of her reliance on *D.O.T. v. Northern*, A-3879-9072, since there respondent erected the billboard *without* any D.O.T. approval, as was not the case here.

Note: a typescript of respondent's handwritten certification of November 8, 1994, is annexed for the Commissioner's convenience, without its exhibits, as Exhibit F.

ARGUMENT OF LAW

The relevant statute as to penalties for violations of the Transportation Act is N.J.S. 27:5-16, relative to signboards. While $50. per day is the dollar minimum, each day is not necessarily to be deemed to be a separate offense. (Significantly, the Administrative Law Judge does not cite the statute in her Initial Decision.)

It is the conduct of the violator "in connection with the violation," which is relevant to the assessment of penalty, not his conduct in regard to litigation: herein lies one of the most egregious errors of the Administrative Law Judge.

It is the "revenue derived from the violation" which is relevant to the assessment of penalty, not the gross income before expenses and taxes: herein lies another of the most egregious errors of the Administrative Law Judge.

Essentially, she treated her role in regard to penalties as authorizing her to impose *sanctions*, although she had no authority to do so under the statute or regulations.

Key precedents, in addition to Justice Garibaldi's landmark decision in *Kimmelman v. Henkels & McCoy, Inc.*, 108 N.J. 123 (1987), are as follows:

A. *New York Outdoor Advertising Co. v. New Jersey Department of Transportation*, 93 N.J.A.R. 2d (TRP) 1 (1993), and

B. *New Jersey Department of Transportation v. Star Enterprises*, 92 N.J.A.R. 2d (TRPJ) 18 (1992).

In *New York* the sign was erected *without* permit, in contradistinction to the present case. It held that penalties do not accrue until service of written notice under N.J.A.C. 16:41-8.12. Above all, it related the formula for assessing penalties to "revenue," defined as "net income."

In *Star* it was made clear that the *burden* of establishing that a penalty is "reasonable, appropriate, and consistent with the law" rests on the Department of Transportation. The minimum penalty was imposed and procedural delay was not invoked as part of the day-count process. (*Star* was an off-premise v. on-premise case.)

METH & METH
Attorneys for Respondent
s/ BY THEODORE SAGER METH
THEODORE SAGER METH

TSM:bc
Enclosures
cc: Judge Naomi Dower LaBastille
cc: Stuart A. Brooks, Deputy Attorney General
cc: Mr. Michael J. McGuire, Supervisor,
Outdoor Advertising

Meth & Meth Letter of Reply to Commissioner of Transportation, Dated December 30, 1994
Wes Outdoor Advertising Co.

RECEIVED
JAN 3 1994
DIV. OF BELL INDUSTRIES

METH & METH
ATTORNEYS AT LAW
625 CENTRAL AVENUE
WESTFIELD, NEW JERSEY 07090
908-654-4900

Theodore Sager Meth
Karl T. Meth

Fax 908-654-5680
Parkway Exit 135

December 30, 1994

Honorable Frank J. Wilson, Commissioner
Department of Transportation
1035 Parkway Avenue
CN 600
Trenton, NJ 08625

Re: State of New Jersey Department of Trans.
v. WES OUTDOOR ADVERTISING CO.
OAL Docket No. TRP-9566-89

Dear Commissioner:

This is a reply to the brief of the New Jersey Department of Transportation dated December 22, 1994, and received on December 27.

It is now apparent that counsel to the DOT and Judge Dower-LaBastille do not understand the meaning of "gross income." They think it means "gross sales," i.e. the total rent paid to Wes during the applicable period, without reference to the cost-of-goods-sold.

It does not. "Gross Income" is clearly defined in N.J.S. 54A:5-1(b) as follows:

> "b. Net profits from business. The net income from the operation of a business, profession, or other activity, after provision for all costs and expenses incurred in the conduct thereof, determined either on a cash or accrual basis in accordance with the method of accounting allowed for federal income tax purposes but without deduction of taxes based on income."

Failure to make findings as to costs and expenses relative to the gross sales is a violation of law and a taking contrary to due process of law. While the cases indicate that a violator "ought not profit" from his unlawful activity, the issue is and must be "profit", not "sales" or "receipts."

Next, there is no issue of *res judicata* here. It is for the Commissioner to determine the quantum of penalty, if any, and no tribunal has rendered a judgment in that regard. The Commissioner alone is to determine the facts and impact of each one of the elements carefully laid out by *Kimmelman v. Henkels & McCoy, Inc.*, 108 N.J. 123 (1987) and N.J.S. 27:5-16. The Commissioner alone is to use as much or as little of Judge Dower-LaBastille's opinion as seems appropriate.

Understandably, the DOT does not want to face the reality that the subject billboard may *now* be entirely legal. Understandably, Wes' suggestion that justice requires a reopening and a reinstatement of the original permit irritates the DOT because the current zoning would then be irrelevant, and probably in violation of the Roadside Sign Control and Outdoor Advertising Act now in force, especially N.J.S. 27:5-11, Chapter 413 (7)(2)(a)

relative to commercial zones established as of September 21, 1959. (Actually this billboard has been in place in the exact location since 1937!)

Such a reopening is with precedent: *Duvin v. State Dept. of Treasury*, 76 N.J. 203 (1978); *Litt v. Rutherford Rent Bd.*, 196 N.J. Super. 456 (L. 1984). Specifically, where the underlying situation has recently changed, as in *Trap Rock Industries v. Sagner*, 133 N.J. Super. 99 (A.D. 1975), recognizing that in administrative proceedings new developments or new evidence of old developments may be considered in the interests of justice; that case, and *Application of Trantino*, 89 N.J. 347 (1982) must be read in light of the DOT's rigid and incorrect reliance on the doctrine of *res judicata* and collateral estoppel. The Commissioner may rely on N.J.S. 52:14B-11 in regard to such a reopening and reconsideration, temporarily, at least, deferring action on the issue of penalties, as in *Trap Rock Industries v. Kohl*, 59 N.J. 471 (1971).

I wish to take exception to the DOT's counsel's representation on page 5 of his brief, next to last line, that "There has never been a stay of this removal provision." I annex the Commissioner's Order of September 10, 1991, evidencing Wes' good faith in this regard. Also, I believe that the sign is presently in exempt status, being used for non-commercial First Amendment speech, an issue before the Superior Court, Docket ATL-C-47 (Chancery).

Finally, if the Commissioner does not believe he should immediately reinstate, he may wish to remand for reconsideration and reopening to the Administrative Law Court, not in the least to receive evidence and take testimony (a) as to "costs and expenses" under N.J.S. 54A:5-1 relative to N.J.S. 27:5-16; and (b) as to reinstatement of the billboard permit.

Respectfully submitted,

METH & METH
Attorneys for Respondent
s/ BY THEODORE SAGER METH
THEODORE SAGER METH

TSM:bc
Enclosure
cc: Judge Naomi Dower-LaBastille
cc: Stuart A. Brooks, Deputy Attorney General
cc: Mr. Michael J. McGuire, Supervisor,
Outdoor Advertising

Letter From Bell to Commissioner of Transportation on Motion to Amend, Dated January 24, 1995

WES OUTDOOR ADVERTISING CO.
P.O. BOX 538—188 RT. 72—MANAHAWKIN, N.J. 08050

Call (609) 597-3222 "*day or night*"

RECEIVED
JAN 24 1995
L. ANTHONY GIBSON, J.S.C.

MOTION TO AMEND
UNDER RULE 4:49-2

Commissioner Frank J. Wilson
New Jersey Department of Transportation
1035 Parkway Avenue
Trenton, New Jersey 08625-0618

Re: OAL DOCKET NO. TRP-4425-94 and
COMM. OF TRANS v. WES OUTDOOR ATL-C-47-94

Dear Commissioner Wilson,

I have received your Decision in the above OAL Docket which I am authorizing my attorneys METH & METH to appeal to the Appellate Division.

Although I object to the entire Order, I am making specific objections to that portion of the Order that you state that you intend to trespass on my property to remove my Billboard while it carries an EXEMPT POLITICAL SPEECH MESSAGE thereon, which I contend removes this Billboard from your authority.

I also object to any such action or intentions while this issue is actively before the Honorable L. Anthony Gibson, A.J.S.C. under Docket Number ATL-C-47-94 in which the State, with you as Commissioner is the Plaintiff, wherein you are seeking authorization to remove my ON PREMISE, POLITICAL SPEECH BILLBOARD.

Certainly any such action will clearly increase and extend your liability for Constitutional Violations against myself and my Business.

I have at all times acted in a lawful manner with your agency and I expect the same in return, please be guided accordingly.

I request that you reconsider and amend your Final Decision under Rule 4:49-2 by striking the REMOVAL PORTION of the Order dated January 13th 1995, since the Billboard is presently Exempt from your regulation.

This matter has become complex enough already, let's not make it any worse.

Respectfully submitted,

s/ WESLEY K. BELL
Wesley K. Bell Pro se
and trading as WES
OUTDOOR ADVERTISING CO.

Copies to:
Hon. L. Anthony Gibson A.J.S.C.—hand delivered
Stewart Brooks, D.A.G.—Certified
Office of Administrative Law—Reg. Mail
Theodore Sager Meth, Esquire—hand delivered

Relevant Portions of the United States Constitution.

ARTICLE III

* * *

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Section 3. Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

* * *

AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES

Amendment 1

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

* * *

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any

criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

* * *

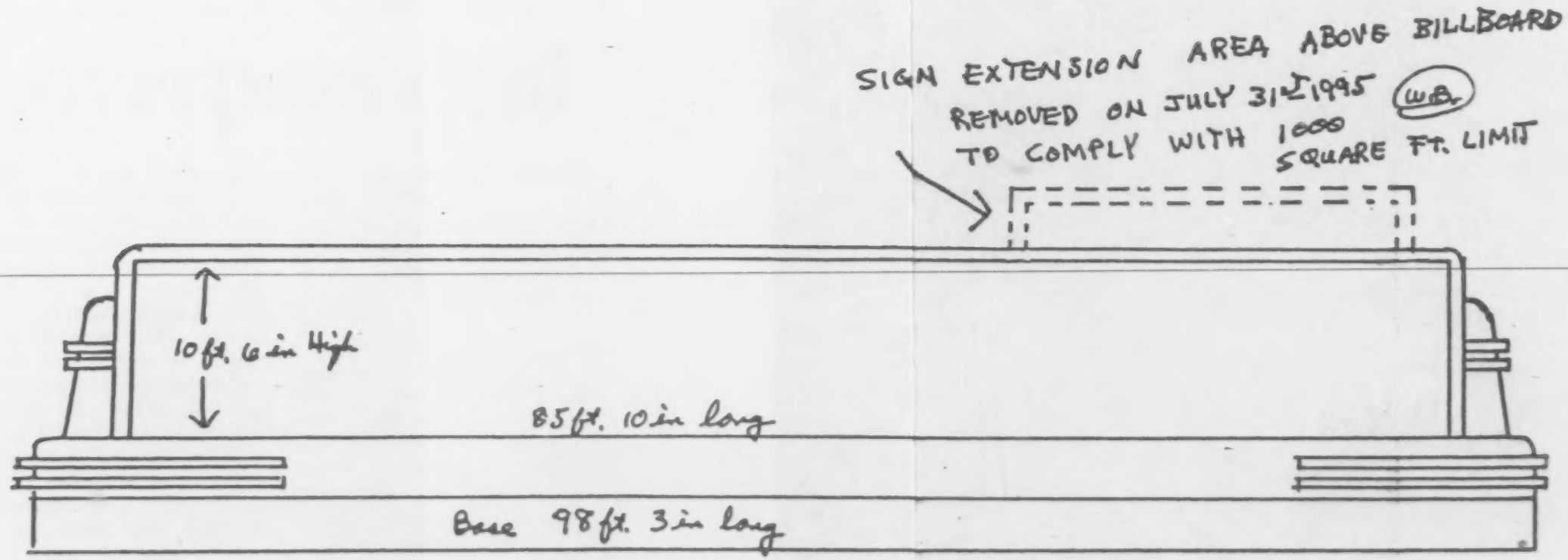
Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

A141

Billboard Overall Measurement Cure to 1000 Sq. Ft., Dated July 31, 1995



sign number - S-G-126

location — Rt. U.S. 30, White Horse Pike (Laberan Blvd.) East of Delsea Road Overpass

WES OUTDOOR ADVERTISING CO.

P.O. BOX 538 — 188 RT. 72 — MANAHAWKIN, N.J. 08050

News Article From the Asbury Park Press,
Dated Tuesday, November 26, 1996

ASBURY PARK PRESS TUESDAY, NOV. 26, 1996

DOT chief guided overpass deal

By ANDY WILLIAMS
STAFF WRITER

A WOODBRIDGE Township engineering firm, hired to design the Raritan Center overpass in Edison Township, got the job at the urging of the state Department of Transportation, whose commissioner — Frank J. Wilson — recently was hired by a sister firm in Los Angeles.

The Middlesex County Improvement Authority, which is handling the overpass project for the county freeholders, awarded the $1.5 million contract to Frederic R. Harris Inc. on Oct. 9.

County officials said a DOT deputy commissioner suggested the firm because its engineers had already worked on preliminary studies for the project and had recently designed an overpass across Route 1 in Plainsboro.

Freeholder Director Alan W. Haag and Freeholder David B. Crabiel said the suggestion came up during a meeting between state and county officials last spring. Neither man could name the deputy commissioner, however.

"They (Harris engineers) were already there at the meeting," Haag said. "It was like it was predestined."

"I don't know if they said it explicitly," said county Administrator Walter DeAngelo, who also attended the meeting. "But it was certainly implicit" that the county should hire the firm.

Wilson, who did not attend the meeting, later signed an agreement with the county pledging to provide $4 million this year and seek an additional $4 million in each of the next three years — for a total $16 million — to build the overpass.

The county will pick up the additional $4 million using annual funding it receives from the DOT for general road improvements.

Wilson announced last week that he will resign his post Dec. 31 to take a job with Los Angeles-based architecture/engineering firm Daniel, Mann, Johnson and Mendenhall. The firm is a subsidiary of AECOM Technology Corp. in Los Angeles, which also owns Frederic R. Harris.

Daniel, Mann, Johnson and Mendenhall received $45 million worth of contracts from NJ Transit — chaired by Wilson — since September 1995. Wilson voted to award contracts to the firm in September 1995 and April 1996 but excused himself from voting on a payment to the firm last month.

Frederic R. Harris has been awarded $12 million worth of DOT contracts since 1994, records show.

Wilson could not be reached yesterday afternoon.

County officials have wanted to build a bridge from Route 514 into Raritan Center — the state's largest industrial park — since the 1970s.

The county, however, could never afford the $20 million to build the bridge until the DOT offered the cash this spring.

Haag and Crabiel said they were called to a meeting with DOT representatives in May or June. Both men said state officials told them the project must be completed by October 1997 — one month before the gubernatorial election.

But that stipulation is not included in the contract between the state and the county, and DOT officials have denied that there was an urgency to build the bridge.

Crabiel said the tight time schedule was another reason the county was given for hiring the Harris firm. Crabiel said state officials also suggested handing the project over to the county improvement authority to speed up the process.

Peter Visceglia, president of Raritan Center and co-owner of Federal Business Centers, said his firm hired Frederic R. Harris within the past year to conduct preliminary engineering work on the overpass.

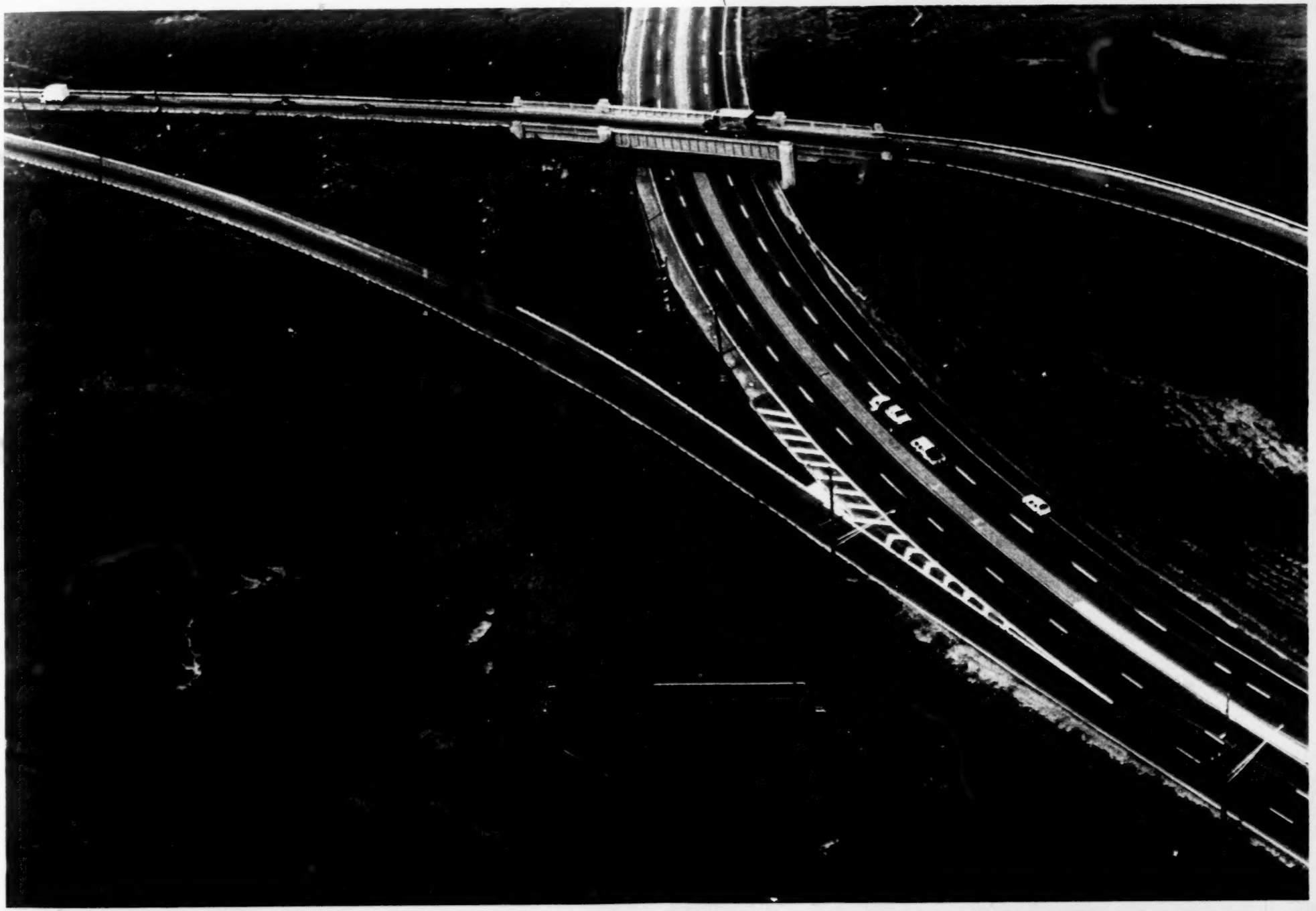
The Harris firm, which designed the New Jersey Turnpike, also was the original planner of Raritan Center in 1965, Visceglia said.

"They certainly are as familiar as anyone with the traffic dynamics in this area," Visceglia said.

BEST AVAILABLE COPY

A145

Aerial Photo—Clearly Shows the Location of Wesley Bell Trading as Wes Outdoor Advertising Co. Billboard on Rt. U.S. 30 in Abescon, New Jersey Before the State of New Jersey Destroyed it in Violation of an Existing Court Stay Order



Destroyed Billboard—State Police Swat Unit Guards Workers During the State's Destruction and Removal to a Landfill of Wesley Bell's Billboard Located on his Lands While the Appellate Court Order of Stay was in Effect